89-1745

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JERRY WAYNE EANES,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

APPENDIX

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Jerry Wayne EANES

v.

STATE of Maryland.

No. 1, Sept. Term, 1989.

Court of Appeals of Maryland.

Feb. 8, 1990.

Argued Before MURPHY, C.J., and ELDRIDGE, COLE, RODOWSKY, McAULIFFE, ADKINS and BLACKWELL,* JJ.

ADKINS, Judge.

Section 121 of Article 27 (1987 Repl. Vol.) makes it unlawful for anyone to "wilfully disturb any neighborhood in [any Maryland] city, town or county by loud and unseemly noises...." In the case before us, we must decide whether this proscription is constitutional when used by the State to limit the volume level of speech protected by the first amendment to the United States Constitution.[1] Before addressing this issue, however, we set out the facts in some detail.

I.

This case arises in the context of an anti-abortion demonstration which took place in front of the Hagerstown Reproductive Clinic (Clinic) on 18 May 1988. The Clinic is located on West Washington Street, a congested, one-way, two-lane thoroughfare in Hagerstown.

* Blackwell, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

[1] "Congress shall make no law . . . abridging the freedom of speech...." This command is directed to state and local government by the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). As petitioner's contentions are based solely on the guarantee of freedom of speech under the first amendment, we do not deal with the similar guarantee under Article 40 of the Maryland Declaration of Rights. *See Sigma Delta Chi v. Speaker, Md. House of Delegates*, 270 Md. 1, 4, 310 A.2d 156, 158 (1973).

The building which houses the Clinic also houses two other businesses and at least one residential apartment. Across the street from the Clinic is a residential apartment building.

On the morning of 18 May, petitioner Jerry Wayne Eanes (Eanes) was part of a small group that had gathered in front of the Clinic to, in Eanes's words, "assemble [,] to speak out against abortion, to pass out gospel tracts [and] to try and talk to girls that are walking by [in order to explain the evils of abortion]." Eanes's primary method of opposing abortion, however, was "to preach the gospel of Jesus Christ." Indeed, he asserted that his purpose was to preach to the entire neighborhood.[2]

Eanes and another man, Timothy Schuller, preached that morning between approximately 10:30 a.m. and 12:00 p.m. Each spoke for short periods of time at varying intervals. Each spoke unaided by any artificial amplification. People employed in the vicinity and local residents complained to the Hagerstown Police Department (Department) that they were being disturbed by the loudness of the preaching. At least one resident left her home and complained to the demonstrators. She requested that the noise level be reduced. The administrator of the Clinic left her office and complained directly to Eanes. She indicated to him that the noise was disrupting her work and requested that he quiet down. Police Officer Feigly, who had responded to complaints received at the Department, also spoke with Eanes and with Schuller. He explained that a number of noise complaints had been received and requested that the volume level of the speech be reduced.

After warning Eanes, Officer Feigly left the scene, although it appears from the record that other police officers remained in the area. He returned approximately forty minutes later in response to further noise complaints received by the Department. At that time he observed

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[2] Preaching on the public street was Eanes's only activity on West Washington Street on 18 May 1988. There is no suggestion that he made any effort to restrain physically anyone who attempted to enter the Clinic or that he tried to block access to the Clinic (see Ch. 807, Acts of 1989). Nor does the State contend that he threatened anyone with physical violence or that he trespassed on private property. Nor did he attempt to incite his listeners to violence, use profanity or obscenity, or hurl "fighting words" at his listeners.

Eanes shouting in a loud voice. He then placed Eanes under arrest for disturbing the peace in violation of § 121.

On 2 August 1988, the District Court of Maryland sitting in Washington County (Glaser, J.) found Eanes guilty of disturbing the peace in violation of § 121. On 15 December 1988, Eanes obtained de novo review of his conviction before Judge Frederick C. Wright, III, of the Circuit Court for Washington County.

At that trial the State presented eleven witnesses who testified as to Eanes's conduct on 18 May: three residents, three local business people, one pedestrian, one police cadet, and three police officers. All generally characterized Eanes's preaching as very or extremely loud. His conduct was more specifically described as "screaming without screeching," "shouting and screaming," "yelling and screaming at the top of his voice." Each of the first six witnesses listed above testified that they were disturbed in their homes or places of business and that it was the loudness and tone they found objectionable, not the message Eanes conveyed. One resident, unable to put her son down for his nap, testified that she and her child were forced to leave their apartment due to the noise. Another resident, in an apartment in.the back of the building across the street from the Clinic, testified that her husband's sleep (he worked the night shift) was disrupted. Each of the three State's witnesses who were employed in the area testified that the volume level of Eanes's speech was so great that it interfered in some manner with their work.

Although there was some conflicting testimony, several of the witnesses agreed that Eanes could readily be heard above the traffic noise. One witness testified that Eanes was "far louder than the vehicle noises," while others testified that he "overpowered" or "overtook" the sounds from the street. It also was said that Eanes could be heard as far away as "the square," a location stated to be a block and a half from where Eanes was preaching.

Eanes, testifying in his own defense, did not, for the most part, dispute this evidence. He testified that in preaching in front of the Clinic, he raised his voice. When asked why he raised his voice, he replied:

> Because I'm speaking not just to the people in that building[.] I was speaking to the general people that were in that

> area, the bystanders, the people driving by, the people that I knew were going to be coming in.

Based on the evidence presented, Judge Wright found Eanes "guilty of willfully disturbing the peace and tranquility of that particular neighborhood during the morning of May the 18th ... by making loud and otherwise unacceptable[,] improper under the circumstances noises."

II.

Eanes raises several constitutional challenges to his conviction. He insists that in *Diehl v. State*, 294 Md. 466, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 363 (1983), this Court definitively limited application of the statutory prohibition against "loud and unseemly noises" to speech that falls outside the protective reach of the first amendment; speech, for example, that advocates imminent, lawless action. Bereft of such a limitation, he argues, the statute is left unconstitutionally vague and overbroad. He concludes that even if § 121 is found to overcome those hurdles, it cannot, consonant with the first amendment, be enforced to limit the volume level of speech that is not artificially amplified.

The State, for its part, disputes each of these contentions. It takes the position that the provision at issue is a content-neutral regulation of the manner of protected speech, one that is neither vague nor overbroad, and one that was properly applied in the case at bar. Noting the substantial disparity between the parties' understanding of the constitutionally permissible scope of § 121, we granted Eanes's petition for writ of certiorari, 315 Md. 223, 554 A.2d 351 (1989), in order to consider if and in what manner § 121 may be applied as a limitation on protected speech.

III.

A.

We begin by disagreeing with Eanes's evaluation of *Diehl*. He reads that opinion much too broadly. We dealt there not with a conviction based on objectionable loudness, but with one based on allegedly objectionable content. As we shall explain, the *Diehl* limitation on which Eanes relies is only applicable when the prohibition

against "loud and unseemly noise" seeks to regulate the content of speech.

Diehl involved a police officer, Gavin, who stopped an automobile for a traffic violation. Diehl, a passenger, left the vehicle but was ordered by Gavin to return to the car. Diehl responded by screaming, "'Fuck you Gavin;' 'I know my rights;' you can't tell me what to do....'" 294 Md. at 468, 451 A.2d at 116. A crowd gathered. After Diehl refused a second time to get back in the car, Gavin arrested him for "'screaming obscenities and . . . drawing a crowd.'" *Id.* at 468, 451 A.2d at 117 [ellipsis in *Diehl*].

The State sought to uphold Diehl's subsequent conviction under § 121 in part on the ground that Diehl violated the statute "by making loud and unseemly noises in refusing 'to obey Gavin's proper order.'" *Id.* at 470, 451 A.2d at 118. At no time did the State argue that the loudness of Diehl's protestations violated § 121.[3] Rather, it was the State's position that the statements "attracted a crowd and enhanced the possibility of chaos." Appellee's Brief in *Diehl v. State* at 6, *see* 294 Md. at 480-481, 487-488, 451 A.2d at 123, 126-127 (Rodowsky, J., dissenting). Since the State's argument addressed the content of Diehl's speech (and not its loudness), we determined that in order to qualify as "*loud and unseemly noise*," under the circumstances, "Diehl's conduct must have advocated imminent lawless action and been likely to incite a breach of the peace...." *Diehl*, 294 Md. at 472, 451 A.2d at 119 [emphasis in original]. In this manner we limited the provision's ability to regulate the content of speech. We did not in that case, however, consider the argument the State at present raises before us: that the statute serves as a constitutionally valid content-neutral regulation of the volume level of protected speech. We now address that question.

B.

The command of the first amendment, that "Congress shall make no law ... abridging the freedom of speech ...," is directed with equal force, by way of the fourteenth amendment, to state and local governments. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500 n.

[3] Indeed, we determined that the decibel level of Diehl's communication was not unexpected under the circumstances. *Diehl*, 294 Md. at 471-472, 451 A.2d at 118.

8, 72 S.Ct. 777, 780 n. 8, 96 L.Ed. 1098,1105 n. 8 (1952) (collecting cases); *Schowgurow v. State*, 240 Md. 121, 124, 213 A.2d 475, 478 (1965). This "constitutional right of free expression" puts "the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787-1788, 29 L.Ed.2d 284, 293 (1971). The "freedom to think as you will and to speak as you think" is a "means indispensable to the discovery and spread of political truth" and is essential both to "stable government" and to "political change." *Whitney v. California*, 274 U.S. 357, 375-377, 47 S.Ct. 641, 648-649, 71 L.Ed. 1095, 1105-1106 (1927) (Brandeis, J., joined by Holmes, J., concurring), *overruled* by *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).[4] It has been described as "the Constitution's most majestic guarantee ...." L. Tribe, *American Constitutional Law* § 12-1 at 785 (2d ed. 1988).

Yet "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses." *Cohen*, 403 U.S. at 19, 91 S.Ct. at 1785, 29 L.Ed.2d at 290. *See Kovacs v. Cooper*, 336 U.S. 77, 85-86, 69 S.Ct. 448, 453, 93 L.Ed. 513, 521 (1949) (sound trucks); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942) ("fighting words"); *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470, 473-474 (1919) (clear and present danger of imminent unlawful conduct). "Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 799, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567, 578 (1985) (nonpublic forum); *see Frisby v. Schultz*, 487 U.S. 474, ___, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420, 428 (1988) (picketing of single residence); *Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, 484 (1965) (obstructing sidewalk). The fun-

[4] Although *Whitney* was overruled by *Brandenburg*, the words of Justice Brandeis remain a meaningful exposition on the singular importance of free speech to the maintenance of our democratic ideals.

damental importance of free speech in our constitutional scheme requires, however, that restrictions on its exercise be subjected to searching scrutiny. *Frisby*, 487 U.S. at ___, 108 S.Ct. at 2499, 101 L.Ed.2d at 428.

Constitutional analysis begins by looking at the type of forum the speaker seeks to employ. *Id.* We deal here with the public streets and sidewalks which have been repeatedly recognized as "archetype[s] of . . . traditional public forum[s]." *Id. See, e.g., Boos v. Barry*, 485 U.S. 312, 318,108 S.Ct. 1157, 1162, 99 L.Ed.2d 333, 343 (1988); *Cornelius, supra*, 473 U.S. at 802, 105 S.Ct. at 3448-3449, 87 L.Ed.2d at 580; *Perry Education Assn v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 954-955, 74 L.Ed.2d 794, 804 (1983). "'[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.'" *Hudgens v. NLRB*, 424 U.S. 507, 515, 96 S.Ct. 1029, 1034, 47 L.Ed.2d 196, 204 (1976) (quoting *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315, 88 S.Ct. 1601, 1606, 20 L.Ed.2d 603, 610 (1968)).[5]

When a court reviews restrictions on speech in traditional public forums, "the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content." *Frisby*, 487 U.S. at ___, 108 S.Ct. at 2500,101 L.Ed.2d at 429. A content-based restriction is constitutionally hale only if it can be shown that the challenged "'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end....'" *Id.* (quoting *Perry*, 460 U.S. at 45, 103 S.Ct. at 955, 74 L.Ed.2d at 804) [ellipsis in *Frisby*]. *See Sable Communications of Calif. v. FCC*, ___ U.S. ___, ___, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93, 106 (1989) (content-based regulation of telephonic commercial communication); *Carey v. Brown*, 447 U.S. 455, 461,100 S.Ct. 2286, 2290, 65 L.Ed.2d 263, 270 (1980) (content-based regulation of residential picketing). On the other hand, a state "'may . . . enforce regulations of the time, place and manner of expression which

[5] The nature of the street in question (i.e., rural residential, commercial, or some variant there of) is not important at this stage of analysis since "all public streets are held in the public trust and are properly considered traditional public fora" *Frisby*, 487 U.S. at ___, 108 S.Ct. at 2500, 101 L.Ed.2d at 429.

are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Frisby*, 487 U.S. at ___, 108 S.Ct. at 2500, 101 L.Ed.2d at 429 (quoting *Perry*, 460 U.S. at 45, 103 S.Ct. at 955, 74 L.Ed.2d at 804). *See Ward v. Rock Against Racism*, ___ U.S. ___, ___, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 675 (1989) (content-neutral regulation of sound volume); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984) (content-neutral ban on overnight sleeping and camping in certain parks).

In this case even Eanes does not question that as applied to protected speech § 121 can be read as content neutral. Indeed, because we are working in the area of protected speech, the statutory phrase "loud and unseemly noise" should be construed in a content-neutral fashion in order to remain in conformity with first amendment jurisprudence. "[I]f one of the proposed interpretations would render an enactment valid, while another would render it invalid or ineffective, the court will construe the enactment to be valid whenever feasible." *City of College Park v. Cotter*, 309 Md. 573, 589, 525 A.2d 1059, 1067 (1987); *see Craig v. State*, 316 Md. 551, 566, 560 A.2d 1120, 1127 (1989).

In *Matter of Nawrocki*, 15 Md.App. 252, 289 A.2d 846 (1972), Judge Orth, then of the Court of Special Appeals, faced with construction of the phrase "loud and unseemly" as it appears in § 121, gave the words their common meaning.

> 'Loud' is 'characterized by high volume and intensity of sound . . . clamorous and insistent.' 'Unseemly' and its synonyms such as 'improper', 'indecorous', 'indelicate' mean 'in violation of accepted standards of what is right or proper.'

Id. at 256, 289 A.2d at 849 [ellipsis in opinion]. "Unseemly" has also been defined as "analogous to the oft-used term 'unreasonable.'" *Heard v. Rizzo*, 281 F.Supp. 720, 741 (E.D.Pa.1968), *aff'd*, 392 U.S. 646, 88 S.Ct. 2307, 20 L.Ed.2d 1358. We interpret the word "unseemly" as directly modifying the volume level of "loud." It requires the meaning of "loud" to be informed by the circumstances. It does not act as a blanket proscription against loud speech. If the other statutory

elements are met, § 121 can be enforced only if the speech is unreasonably loud under the circumstances.[6] Construed in this manner the phrase "loud and unseemly noise" is clearly content-neutral.

This content-neutral law is not a regulation of time or place. Under the statute individuals may speak in any traditional public forum at any time. The elements of time and place operate, in the context of the statute, to inform; they are not themselves the subject of regulation. As the State correctly contends, § 121 is a regulation on the manner of expression. It serves to limit, under proper circumstances, the loudness of the delivery of the communication.

As a regulation on the manner of expression, § 121 must be narrowly tailored to serve a substantial government interest. The Supreme Court recently pointed out that "it can no longer be doubted that government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise.'" *Ward*, ___U.S. at ___, 109 S.Ct. at 2756, 105 L.Ed.2d at 678 (quoting *City Council of Los Angeles v. Taxpayer for Vincent*, 466 U.S. 789, 806,104 S.Ct. 2118, 2129, 80 L.Ed.2d 772, 787 (1984), citing *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949)) [brackets in *Ward*]. *See also Saia v. New York*, 334 U.S. 558, 562, 68 S.Ct. 1148,1150, 92 L.Ed. 1574, 1578 (1948); *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir.1980).

What is more

> [t]his interest is perhaps at its greatest when government seeks to protect "'the well-being, tranquility and privacy of the home.'" *Frisby v. Schultz*, 487 U.S. at [___], [108 S.Ct. at 2502,101 L.Ed.2d at 431] (quoting *Carey v. Brown*, 447 U.S. [at] 471[100 S.Ct. at 2296, 65 L.Ed.2d at 276] (1980)), but it is by no means limited to that context, for the government may act to protect even such traditional forums as city streets and parks from excessive noise. [citations omitted]

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[6] In a similar fashion, a federal regulation which prohibited disruption of the official duties of government employees by "'loud or unusual noise'" was held to "include speech ... only where the manner of expression is in itself unreasonable." *United States v. Occhino*, 629 F.2d 561, 563 (8th Cir.1980) (per curiam), *cert. denied*, 450 U.S. 968, 101 S.Ct. 1487, 67 L.Ed.2d 618 (1981).

Ward, ___U.S. at ___, 109 S.Ct. at 2756, 105 L.Ed.2d at 678-679. In *Ward*, the Supreme Court upheld a regulation which gave New York City broad authority to control the volume level of concerts and other performances (recognized as protected speech) at a Central Park bandshell, on the justification that the City sought "to avoid undue [noise] intrusion into residential and other areas of the park." *Id.* at __, 109 S.Ct. at 2754, 105 L.Ed. 2d at 676.

In *Kovacs, supra*, a much earlier anti-noise case relied on in *Ward*, the Supreme Court upheld a city ordinance which prohibited the use of sound trucks which emitted "loud and raucous" noise. As in *Ward*, the concern in *Kovacs* was on protecting the "unwilling listener" both on the street and in the privacy of his or her home. 336 U.S. at 86-87, 69 S.Ct. at 453, 93 L.Ed. at 522. Without such regulation, the court remarked, "in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would . . . be at the mercy of advocates of particular religious, social or political persuasions." *Id.* at 87, 69 S.Ct. at 453, 93 L.Ed. at 522.

Ward and *Kovacs*, as well as numerous other Supreme Court cases, reflect judicial concern with balancing the right of free speech with the individual's right to be free from unwanted communication. *See, e.g., Frisby*, 487 U.S. at ___, 108 S.Ct. at 2502, 101 L.Ed.2d at 431; *Carey*, 447 U.S. at 470-471, 100 S.Ct. at 2295, 65 L.Ed.2d at 276; *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073, 1093 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-211, 95 S.Ct. 2268, 2272-2274, 45 L.Ed.2d 125, 130-132 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770, 776-777 (1974); *Cohen*, 403 U.S. at 21-22, 91 S.Ct. at 1786, 29 L.Ed.2d at 291-292 (1971); *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). This has often been expressed in terms of the "captive audience."

The notion of "captive audience" involves the problem of the unwilling listener or viewer who cannot readily escape from the undesired communication, or whose own rights are such that he or she should not be required to do so. *See* Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?* 67 Nw.U.L.Rev. 153, 195-197 (1972). The pedestrian or motorist on a public street may simply walk

or drive past the unwelcome speaker or detour around the picketers or demonstrators. As in *Cohen*, 403 U.S. at 21-22, 91 S.Ct. at 1786, 29 L.Ed.2d at 291-292, those who do not care to read or hear certain messages are, in these circumstances, free to turn away. But the *Cohen* Court pointed out that the people passing through a courthouse corridor, who could look the other way if they did not like the anti-draft message on the back of Cohen's jacket, "were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences." 403 U.S. at 21, 91 S.Ct. at 1786, 29 L.Ed.2d at 292. Justice Harlan, writing for the Court, explained:

> [T]his Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue.... The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Id. [citations omitted]. *See also Carey*, 447 U.S. at 471,100 S.Ct. at 2295, 65 L.Ed.2d at 276 (1980) (preserving sanctity of the home from tribulations of daily pursuits is an important value).

Thus, while door-to-door residential canvassing cannot be subject to blanket prohibition, *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 LEd. 155 (1939), a householder who does not wish to be canvassed may be permitted to prevent unwelcome visits by invoking trespass laws. *Martin v. Struthers*, 319 U.S. 141, 147-148, 63 S.Ct. 862, 865-866, 87 L.Ed. 1313, 1319 (1943). Within the home, "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica Foundation*, 438 U.S. at 748, 98 S.Ct. at 3040, 57 L.Ed.2d at 1093. For even if "the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, ... a different order of values obtains in the home." *Id.* at 759, 98 S.Ct. at 3045-3046, 57 L.Ed.2d at 1100 (Powell, J., concurring) [citations omitted]. *See also Frisby*, 487 U.S. at ___, 108 S.Ct.

at 2503, 101 L.Ed.2d at 432 (unwilling listeners may be protected within their own houses); *Rowan v. Post Office Dept.*, 397 U.S. at 736, 90 S.Ct. at 1490, 25 L.Ed.2d at 742-743 (householder may act to preclude receipt of unwanted mail).

Moreover, a captive audience that is entitled to protection may exist outside the home. Because riders on public rapid transit vehicles are captive audiences, a municipality may decline to accept political advertising on these vehicles. *Lehman, supra. See also Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (ordinance prohibiting disturbance of school).

The principle is grounded on the concept of privacy. "The Supreme Court permits the state to protect listeners who are 'captive' to unwanted speech – when speech invades their privacy interest in an essentially intolerable manner." Note, *Too Close For Comfort: Protesting Outside Medical Faculties*, 101 Harv.L.Rev. 1856, 1863 (1988) [footnote omitted]. Although that protection is most often extended to those within their homes, it may be extended to any situation in which "privacy interests [are] substantially threatened" because "individuals cannot escape 'bombardment of [their] sensibilities.'" *Id.* at 1864 (quoting *Erznoznik*, 422 U.S. at 211, 95 S.Ct. at 2273, 45 L.Ed.2d at 132, quoting *Cohen*, 403 U.S. at 21, 91 S.Ct. at 1286, 29 L.Ed.2d at 292). *See also* Comment, *'I'll Defend to the Death Your Right to Say It ... But Not to Me' – The Captive Audience Corollary to the First Amendment*, 1983 S.III. U.L.J. 211, 215-216.

Sound is one of the most intrusive means of communication. "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it." *Kovacs*, 336 U.S. at 86-87, 69 S.Ct. at 453, 93 L.Ed. at 522 [footnote omitted]. The cases support the view that content-neutral regulations controlling its loudness are permissible. *See, e.g., Ward*, (volume may be controlled to protect area of park and nearby residences); *Grayned*, (ordinance prohibiting disturbance of good order of a school valid); *Kovacs* (municipality may control volume of sound trucks); *Reeves* (city may protect citizens from unreasonable or disruptive levels of noise in streets). It may be otherwise outside the home or office, where the audience is ordinarily not captive, *see Pacifica Foundation*, 438 U.S. at 749 n. 27, 98 S.Ct. at 3040 n. 27, 57 L.Ed.2d at 1093 n. 27;

Erznoznik, 422 U.S. at 209-211, 95 S.Ct. at 2272-2273, 45 L.Ed.2d at 130-132; *Cohen*, 403 U.S. at 21, 91 S.Ct. at 1786, 29 L.Ed.2d at 292. But § 121 prohibits only that volume level of communication that unreasonably disturbs individuals whose rights to be free from aural abuse override the right of a speaker to address them by direct or incidental oral communication. This is the type of balance of conflicting interests contemplated by first amendment jurisprudence.

We read the statute as going no further than to afford content-neutral protection to the captive auditor (on the facts before us, auditors in homes or in private offices) who cannot avoid continuing, unreasonably loud and disruptive communications emanating from the street. So read, the statute serves a substantial interest and is narrowly tailored to serve those ends.[7]

When the State seeks to correct a particular evil by way of time, place, or manner restrictions, it need not employ the least restrictive or least intrusive means. *Ward*, ___ U.S. at ___, 109 S.Ct. at 2758, 105 L.Ed.2d at 680. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536, 548 (1985) [ellipsis in *Ward*]. Since the character of open public places may differ widely, one from another, only a flexible approach to volume control can adequately serve the myriad circumstances which the State can legitimately

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[7] We reject the argument that a statute of this nature may survive first amendment scrutiny only if it is limited to a communication that is both loud and either presents a clear and present danger of violence or is not intended as a communication but "is merely a guise to disturb persons." *See In re Brown*, 9 Cal.3d 612, 108 Cal.Rptr. 465, 469, 510 P.2d 1017, 1021 (1973), *cert. denied*, 416 U.S. 950, 94 S.Ct. 1959, 40 L.Ed.2d 300 (1974). *See also People v. Fitzgerald*, 194 Colo. 415, 420, 573 P.2d 100, 104 (1978); *State v. Marker*, 21 Or.App. 671, 678, 536 P.2d 1273, 1277 (1975). We have already held that *Diehl v. State*, 294 Md. 466, 451 A.2d 115 (1982), requires no such construction. Neither do the United States Supreme Court decisions. Our construction of § 121 is not inconsistent with decisions that hold antinoise statutes do not apply to speech protected by the first amendment. *See, e.g., Commonwealth v. Mastrangelo*, 489 Pa. 254, 414 A.2d 54, *appeal dismissed*, 449 U.S. 894, 101 S.Ct. 259, 66 L.Ed.2d 124 (1980). Cases of this type are concerned with possible regulation of content. We have already held that § 121 is content-neutral.

regulate. As we have pointed out, it is the particular circumstances that render a loud communication unseemly or unreasonable, and hence subject to time, place, and manner regulations.

Consider apartment dwellers and workers in private offices along West Washington Street. The record in this case makes clear that during business hours the street is heavily travelled by motor vehicles, including large trucks. This traffic produces a high noise level, and one who wishes to communicate by voice with people in the street must make his or her voice heard over the sound of traffic. But when the volume of the speaker's voice not only reaches passersby in the street – the public forum – but also awakens adults sleeping in their homes, prevents children from taking their naps, and makes it impossible for workers to concentrate on their work, the volume's effect on the captive audience reaches a point at which that volume may be controlled.[8]

One speaking on West Washington Street at midnight, with traffic levels much reduced, could run afoul of § 121 at a lower level of voice volume. In this quieter environment, a less loud oral presentation could unreasonably disturb what might well be a larger captive audience, at least from the viewpoint of apartment dwellers. *See People v. Fitzgerald*, 194 Colo. 415, 419, 573 P.2d 100, 103 (1978) (proscribed conduct "necessarily varies according to the time, location and decibel level of such conduct"); *Commonwealth v. Orlando*, 371 Mass. 732, 735, 359 N.E.2d 310, 312 (1977) (same). And if we move the scene to an area of Hagerstown that is solely residential, still

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[8] In the context of common law nuisance, this Court has stated that:

> "It can scarcely be argued that any habitual noise ... which is so loud, continuous, insistent, not inherent to the character of the neighborhood, and unusual therein, that normal men, women, and children, when occupying their own homes, however distant, are so seriously incommoded that they cannot sleep, study, read, converse, or concentrate until it stops, is not an unreasonable unlawful, invasion of their rights."

Swimming Club v. Albert, 173 Md. 641, 647,197 A. 146, 148-149 (1938) (quoting the chancellor's decision in that case). The criteria for disturbance of the peace by noise are sometimes equated with those for nuisance. *See, e.g., State v. Holland*, 132 N.J.Super. 17, 27, 331 A.2d 626, 631 (1975); *State v. New York Central Railroad Co.*, 37 N.J.Super. 42, 49, 116 A.2d 800, 804 (1955).

different levels of speech might suffice to violate the statute. *Reeves*, 631 F.2d at 385 n. 10 (threshold level of prohibited disruptive noise may be substantially lower in areas primarily residential). We deal with a balancing that involves the time and place where speech occurs as well as the nature of the places where auditors are – the street itself; stores; schools; hospitals; private offices; homes. A sound level that a pedestrian on the sidewalk could not constitutionally object to might be impermissible with respect to a patient in an intensive care ward.

Another factor that enters the balancing is that of alternative means. We shall have more to say about this topic shortly in a somewhat different context. Whether there is some other way of achieving the actor's goal is to be considered in the determination of whether a loud sound is unreasonably loud. Road construction equipment, for example, may make a great deal of noise and may seriously disturb people in homes, hospitals, schools, and offices. But broken water mains must be repaired and streets must be maintained, and it is often the case that noisy machines are the only practicable means of achieving these objectives. Thus, the sound created by that sort of activity is not necessarily unseemly or unreasonably loud. But a speaker will usually have a number of less noisy ways of presenting his or her message: speaking at lower volume; individual contact; use of placards or leaflets. So the balance of reasonableness may rest differently depending on the circumstances. *See Commonwealth v. Greene*, 410 Pa. 111, 115-116, 189 A.2d 141, 144 (1963).

Another weight in the balance may be the mechanical or electronic amplification of sound. It is no doubt easier to find that an antinoise law is constitutional when it deals with that sort of amplification, as did the ordinance in *Kovacs, supra. See also, e.g., Ward, Saia* and *Reeves*, all *supra*. But even though cases like *Kovacs* emphasize the sound-truck feature of the law, we reject Eanes's argument that amplification is a constitutional *sine qua non*. Eanes would have it that a speaker could stand in front of a residence at two o'clock in the morning and shout at top volume as long as he or she pleased provided a message was being conveyed. We disagree. If the State is able to prove that, under the circumstances, the human voice is so unreasonably loud as to be unreasonably intrusive on a captive audience, that is enough. *See, e.g., Grayned, supra*. Captive auditors in their homes and

places of business need not become an unwilling congregation for Eanes's street-preaching.[9]

Eanes suggests that only a statute which sets a specific decibel level would be constitutional. Yet even with respect to a particular public forum, such as Hagerstown's West Washington Street, a decibel level that would permit communication with passersby and not disturb residents in their homes may vary with the time of day, air temperature, air currents, and background noise present. A standard which more specifically defined acceptable decibel levels at varying times and places would be likely both underinclusive and overbroad. *See Commonwealth v. Orlando*, 371 Mass. at 735, 359 N.E.2d at 312 (addressing the statutory standard "disturbers of the peace"). *See also Mann v. Mack*, 155 Cal. App.3d 666, 674, 202 Cal.Rptr. 296, 301-302 (1984) ("A determination as to what constitutes a 'loud, unnecessary and unusual noise' requires common sense not a decibel meter").[10] Because § 121 is tailored to respond to the individual circumstances and, as it is here construed, to regulate only that conduct which on balance can appropriately be limited consistent with the first amendment, we conclude it is sufficiently narrowly tailored.

Bolstering our determination that § 121 is narrowly tailored is the fact that the statute allows for ample alternative avenues of

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[9] Eanes asserts that *Cohen* prohibits the regulation of speech that does not invade "substantial privacy interests in an *intolerable manner*." Petitioner's Brief at 27-28 [emphasis supplied]. By this Eanes means, we take it, "in a manner that is physically or psychologically unbearable." The cases do not require sound to rise to ear-drum breaking level before government can regulate. It is the invasion of privacy that is intolerable, not the sound level that produces it. *See Ward v. Rock Against Racism*, ___U.S.___, 109 S.Ct. 2746,105 L.Ed.2d 661 (1989), in which the Supreme Court upheld a regulation of sound volume without requiring that the noise be "in tolerable" before regulation could be affected. In any event, *Cohen* dealt with the content of speech, not its volume. 403 U.S. at 20-22, 91 S.Ct. at 1785-1787, 29 L.Ed.2d at 291-292. What is more, the passage from *Cohen*, on which Eanes relies, addresses "[t]he ability of the government, consonant with the Constitution, *to shut off discourse....*" *Id.* at 21, 91 S.Ct. at 1786, 29 L.Ed.2d at 291 [emphasis supplied]. We are dealing here with a statute that does not "shut off discourse" but simply limits its volume.

[10] For some problems that may arise from "regulation by decibel," *see U.S. Labor Party v. Pomerleau*, 557 F.2d 410 (4th Cir.1977). *See also Reeves v. McConn*, 631 F.2d 377, 386 (5th Cir. 1980) (enforcement of decibel-based regulation is a highly complex issue).

communication. *See Vincent*, 466 U.S. at 812, 104 S.Ct. at 2132-2133, 80 L.Ed.2d at 792. *See also* J. Nowak, R. Rotunda, J. Young, *Constitutional Law* (3d ed. 1986) § 16.47 at 971. Nothing in § 121 prevents a speaker from orally addressing passersby, or from distributing literature or carrying a sign which expresses his or her viewpoint. Nor, if the intent of the speaker is to reach area residents or merchants, is an individual prohibited by § 121 from communicating with willing recipients by telephone, postal service, or in person. That a speaker's potential aural audience may be limited by the inability to stand outside a residence or business and scream a message to the unwilling listener therein is of little consequence when there are ample alternative channels of conveying that communication which have not been shown to be inadequate. *Ward*, ___ U.S. at ___, 109 S.Ct. at 2759, 105 L.Ed.2d at 682.

In summary, we hold that § 121, as we have construed it, is content neutral, narrowly tailored to serve a significant State interest, and does not inhibit the use of various alternative channels of communication. It does not violate the first amendment unless the words "loud and unseemly noise" in § 121 render the statute vague or overbroad. We next consider those concerns.

IV.

A.

A penal statute is vague if it violates "[t]he cardinal requirement ... that [it] 'be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.'" *Bowers v. State*, 283 Md. 115, 120, 389 A.2d 341, 345 (1978) (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926)). In *Bowers*, we described this "as the fair notice principle [which] is grounded on the assumption that one should be free to choose between lawful and unlawful conduct." *Id.* at 121, 389 A.2d at 345. *See Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298, 33 L.Ed.2d at 227. A statute also may be void for vagueness if it lacks fixed enforcement standards or guidelines and thus "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-109,

92 S.Ct. at 2299, 33 L.Ed.2d at 228. Both of these tests of vagueness are based on fourteenth amendment due process or fairness concerns. Tribe, *supra*, § 12-31. We first address the issue of notice.

A law is not vague simply because it requires conformity to an imprecise normative standard.

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colten v. Kentucky, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584, 590 (1972). The touchstone is whether persons of "'common intelligence'" need reasonably "'guess at its meaning.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830, 837 (1973) (quoting *Connally*, 269 U.S. at 391, 46 S.Ct. at 127, 70 L.Ed. at 328).

Bowers involved a vagueness challenge to a then-existing child abuse statute which made it unlawful to injure a child by "cruel or inhumane treatment." 283 Md. at 119, 389 A.2d at 344. The statute was attacked, in part, for failing to delineate, with any specificity, between legitimate corporal punishment and illegitimate child abuse. We determined that

> [a] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning.

Id. at 125, 389 A.2d at 347. Using a variety of the sources listed above to define the phrase "cruel or inhumane," the statute was determined to be "sufficiently explicit...." *Id.* at 127, 389 A.2d at 349. We explained that

> [p]arents of ordinary intelligence are made aware that they do not subject themselves to the statute by merely engaging in corporal discipline for the purpose of punishment or

> correction. Only when the line is crossed and physical injury is intentionally and maliciously or cruelly inflicted does criminal responsibility attach.

Id. at 128, 389 A.2d at 349.

Other courts have applied these principles in responding to vagueness attacks on antinoise laws. For example, in *Kovacs, supra*, the Supreme Court confronted a vagueness challenge to the not-too-dissimilar statutory phrase "loud and raucous." 336 U.S. at 79, 69 S.Ct. at 449, 93 L.Ed. at 518. Remarking that the claim deserved only passing mention, the Court stated that "[w]hile these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Id.* at 79, 69 S.Ct. at 449-450, 93 L.Ed. at 518.

The method of analysis is further demonstrated in *Grayned, supra*. That case involved a Rockford, Illinois, ordinance that made it a crime for anyone willfully to make a noise or diversion which disturbed or tended to disturb the peace or good order of any school in session. 408 U.S. at 107-108, 92 S.Ct. at 2298, 33 L.Ed.2d at 227. The Supreme Court held the ordinance was not unconstitutionally vague. The words "tending to disturb," in a Chicago ordinance, had previously been construed by the Supreme Court of Illinois to refer only to an imminent threat of violence. *Id.* at 110-112, 92 S.Ct. at 2299-2301, 33 L.Ed.2d at 228-230. The Rockford ordinance did not define the requisite quantum of disturbance, but the United States Supreme Court found that this question was measured by the impact of the disturbance on school activity. Given the requirements of (1) willful conduct, (2) that the noise or diversion be actually incompatible with normal school activity, and (3) a demonstrated causal relationship between "noise or diversion" and disruption, the ordinance withstood constitutional scrutiny. *Id.* at 113-114, 92 S.Ct. at 2301-2302, 33 L.Ed.2d at 230-231.

In similar fashion, we here apply normal meanings to words of common understanding and conclude that speech that is so unreasonably loud as to unreasonably intrude on the privacy of a captive audience may be punished.[11] We hold that the words "loud and

[11] The objective, content-neutral perspective of § 121 is quite unlike that of an ordinance recently found unconstitutionally vague in *Fratiello v. Mancuso*, 653

unseemly," so construed, give sufficient notice of what conduct is penalized. "Unseemly" modifies "loud" and means "unreasonably loud in the circumstances." That is clear enough. The objective "reasonable" test is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct.[12]

An exhaustive listing of words or phrases deemed not unduly vague would unduly prolong this opinion. We note a few examples in addition to those we have already discussed: *Reeves*, 631 F.2d at 386 (prohibition of sound that is "jarring" or "a nuisance" not unconstitutionally vague; words do not provide mathematical certainty, but have acquired sufficiently definite content through daily use); *State v. Johnson*, 112 Ariz. 383, 542 P.2d 808 (1975) (statute that made it a

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F.Supp. 775 (D.R.I.1987). One of the problematic provisions of the ordinance addressed in that case prohibited "'unnecessary noises or sounds .. . which are physically annoying to persons....'" *Id.* at 791. The court construed the ordinance as a content-based restriction on a selected category of speech which the listener subjectively finds annoying. *Id.* It acknowledged that in limited circumstances selective restrictions on speech have been upheld, such as "'when the speaker intrudes upon the privacy of the home ... or the degree of captivity make it impractical for the unwilling viewer or auditor to avoid exposure.'" *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125, 131 (1975)) [ellipsis in *Fratiello*]. But, unlike the case at bar, the court found that protection of the captive auditor was neither alleged nor demonstrated as a basis for the restriction. *Id.*

[12] For examples primarily in the area of criminal law, *see Simmons v. State*, 313 Md. 33, 40, 542 A.2d 1258, 1261 (1988) (imperfect self-defense; subjective belief that force was necessary unreasonable under the circumstances); *State v. Crawford*, 308 Md. 683, 696, 521 A.2d 1193,1199 (1987) (reasonable apprehension of imminent danger element of defense to unlawful possession of handgun); *Dixon v. State*, 302 Md. 447, 459, 488 A.2d 962, 967 (1985) (element of assault: any action or conduct reasonably tending to create apprehension); *Ricketts v. State*, 291 Md. 701, 709, 436 A.2d 906, 910-911 (1981) (element of common law indecent exposure: reasonable knowledge, actual or constructive, that act is open to observation by others); *Tichnell v. State*, 287 Md. 695, 718, 415 A.2d 830, 842 (1980) (claim of self-defense requires defendant have a reasonable belief of immediate or imminent death or serious bodily harm); *Jackson v. State*, 286 Md. 430, 441, 408 A.2d 711, 718 (1979) (quoting *Wharton's Criminal Law* § 68 (Anderson, 1957)) (criminal liability may arise where "'the ultimate harm is one which a reasonable man would foresee as being reasonably related to the acts of the defendant'"); *Mangum v. Md. St. Bd. of Censors*, 273 Md. 176, 185, 328 A.2d 283, 288 (1974) ("obscenity" to be tested by average person applying contemporary community standards).

misdemeanor to "maliciously and wilfully disturb[ ] the peace or quiet of a neighborhood ... by loud or unusual noises" is valid); *Commonwealth v. Jarrett*, 359 Mass. 491, 269 N.E.2d 657 (t971) ("disturbers of the peace" not unconstitutionally vague); *State v. Smith*, 46 N.J. 510, 518, 218 A.2d 147, 151, *cert. denied*, 385 U.S. 838, 87 S.Ct. 85, 17 L.Ed.2d 71(1966) (statute proscribing "noisy or disorderly conduct" which "disturbs or interferes with the quiet or good order" of certain places of assembly is valid; "if there is a public interest in need of protection, due process does not stand in the way merely because the subject defies minute prescription"); *State v. Holland*, 132 N.J.Super. 17, 23, 331 A.2d 626, 629 (1975) (prohibition of "unreasonably loud and unnecessary noise" valid because "[w]hether a given noise disturbs the public peace depends upon the circumstances of the particular case, and it is impractical to spell out rigid legislative criteria"); *Commonwealth v. Weiner*, 230 Pa.Super. 245, 326 A.2d 896 (1974) ("loud" and "unseemly" not unconstitutionally vague); *Seattle v. Eze*, 111 Wash.2d 22, 759 P.2d 366 (1988) ("loud or raucous behavior" which "unreasonably disturbs others" not unconstitutionally vague).

The words "loud and unseemly noise" as used in § 121 are no more vague than the words considered in the preceding cases. As we have construed it, the phrase "loud and unseemly noise" reasonably conveys what is forbidden. Nevertheless, a speaker exercising the legitimate rights of free speech may be unaware that his or her volume has reached a prohibitive level and has become unlawfully disruptive. In order, then, to provide fair notice in a case such as this, we believe that the application of § 121 ordinarily requires prior warning by police authority, so that the speaker is made aware that further communication at the offensive volume level may subject the individual to prosecution. *See Bacheller v. State*, 3 Md.App. 626, 634-635, 240 A.2d 623, 628 (1967), *rev'd on other grounds*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1968) (Art. 27, § 123, prohibiting disorderly conduct, gives reasonable notice through its language, at least when demonstrators are notified, before arrest, that they are in violation of statute); *Occhino*, 629 F.2d at 563 (conduct held to be "unreasonable" where disruptive behavior continued after individual was warned that disturbance was being created); *Weiner*, 230 Pa.Super. at 250, 326 A.2d at 898 (statute prohibiting "loud and unseemly noise" violated

when Weiner continued to use loudspeaker in residential area after police had warned him that residents had been disturbed).

As to the matter of enforcement standards, we also addressed this issue in *Bowers*, wherein we concluded that a statute is not vague

> merely because it allows for the exercise of some discretion on the part of law enforcement and judicial officials. It is only where a statute is so broad as to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional under this second arm of the vagueness principle.

283 Md. at 122, 389 A.2d at 346.

Section 121, properly construed, does not invite arbitrary or discriminatory enforcement. It can be enforced to limit protected speech only to the extent the speaker's actions are willful, the volume clearly exceeds what is necessary to address passersby, and the noise is actually disruptive to the "captive" audience in the neighborhood. Moreover, we hold that police may act under this statute only upon receipt of a complaint from an affected citizen upon the basis of which the officer reasonably believes that the statute has been violated. *See Weiner, supra*. This requirement guards against oppressive action initiated solely by government opposition to unwelcome speech. Circumscribed in this manner § 121 does not permit a subjective determination of what is "loud and unseemly noise." The inquiry is limited to relatively objective criteria and does not confer "impermissible discretion" on police officers, prosecutors, judges, or juries. *Bowers*, 283 Md. at 128, 389 A.2d at 349.

B.

We need not dwell long on Eanes's claim that § 121 is overbroad. "The crucial question ... is whether the [statute] sweeps within its prohibitions what may not be punished under the First and Fourteenth amendments." *Grayned*, 408.U.S. at 114-115, 92 S.Ct. at 2302, 33 L.Ed.2d at 231. The concern is that an overbroad statute may, by that very fact, have a chilling effect on free expression. *Taxpayers for Vincent*, 466 U.S. at 796-798, 104 S.Ct. at 2124-2125, 80 L.Ed.2d at 781-782. That is, if a statute is to be struck down as overbroad, it must appear that the statute's very existence will inhibit free expression. *Id.*

at 799, 104 S.Ct. at 2125, 80 L.Ed.2d at 782. The doctrine is "strong medicine" and should be applied sparingly. *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, 37 L.Ed.2d at 841. It should not be invoked when a limiting construction can be placed on the statute. *Id.* Because the overbreadth doctrine involves a challenge to the facial validity of a statute, a court should not resort to it unless there is a realistic danger that the statute itself will significantly compromise recognized first amendment protection of parties not before the court. *Taxpayers for Vincent*, 466 U.S. at 801,104 S.Ct. at 2126, 80 L.Ed.2d at 784.

Eanes argues that § 121 is overbroad because "it delegates standardless discretionary power to local authorities to permit or deny first amendment activity" and "because its prohibition against 'unseemly' conduct can readily ban speech on the basis of its content." Petitioner's Brief at 21-22. We have already rejected these arguments at various points in this opinion and need not repeat our reasoning.

As we have concluded, § 121 is neither without applicable enforcement standards nor can it be permissibly applied when the objection to speech is solely based on its content. What is more § 121, properly applied, reaches only that conduct which can be regulated consistent with the rights of free speech and does not reach beyond. The instant case is not unlike *Boos v. Barry, supra*. There, a provision of the District of Columbia Code was attacked as overbroad. The provision penalized any congregation of three or more persons within 500 feet of a foreign embassy, if the persons failed to disperse when ordered to do so. The Supreme Court construed the law to prohibit only "congregations" directed at an embassy and to permit the police to order dispersal only when they reasonably believed that a threat to the security or peace of the embassy was present. 485 U.S. at 331,108 S.Ct. at 1169, 99 LEd.2d at 350-351. As so construed, the statute was not unconstitutionally overbroad because it was site specific and limited to groups presenting security threats. *Id.* As a consequence, it did not reach a substantial amount of constitutionally protected conduct. *Id.* It did not have the chilling effect that is the concern of overbreadth analysis. This is also true of § 121 as we have construed it. It is not overbroad.

V.

We now consider the final issues of whether § 121 was properly applied to the specific facts of this case and whether that application was constitutional.

The record demonstrates that Judge Wright construed § 121 in a manner consistent with this opinion. In denying Eanes's motion for judgment of acquittal at the close of the State's case, Judge Wright rejected Eanes's notion that *Diehl, supra*, limited application of § 121's prohibition against "loud and unseemly noises" to speech which advocated imminent lawlessness. After reviewing the words "loud" and "unseemly," as they were defined by Judge Orth in *Nawrocki, supra*, Judge Wright concluded:

> Courts may differ. Judges will differ. Whether they are trial judges or whether they are appellate judges in the areas of speech and protection of speech. But I think that the evidence that I've heard which indicates basically that Mr. Eanes during this morning in question was extremely loud, louder than normal, ["]one of the two loudest persons I've ever heard in my life,["] [at a] volume above the traffic.... But that the entire commotion then caused sufficient complaints to bring the police and the police officer asking Mr. Eanes to lower his voice and lower therefore the intensity and not withstanding that Mr. Eanes shouted about money for drugs, etc. at a very high voice, could well lead to the conclusion that his actions on this morning were to willfully disturb the peace and tranquility of the neighborhood. Not caring about whom he did disturb whether it be those that may have been targets of the language or those of [the] general public....
>
> It was not the content. The content of his language really was not that which was disturbing. It is interesting that the people ... some of the people who were disturbed ... indicated that they agreed with his purposes. And I think that there is sufficient evidence to indicate that on this occasion ... Mr. Eanes was using his right to communicate ideas to not only communicate but to willfully disturb. And I think that that kind of activity is proscribed by Section 121.

After Eanes presented his defense and closing arguments were made, Judge Wright, in his ruling from the bench, explained how the statute was to be applied.

> The statute . . . talks about willful disturbance of any neighborhood by means of loud and unseemly noises. Now the loudness of Mr. Eanes' expressions ... may well be a matter of how one views it, how one hears obviously. What is loud to one person may not be loud to another....
>
> But the Legislature said loud. So that has to be a fact that's found. And I would find from the evidence that Mr. Eanes' method and manner of expression was on this day in May of May 18, [1988] loud.
>
> Now the Legislature also said and unseemly noises. And we know that the Court, the trier of fact is to give that adjective its common meaning, improper. And improper of course means under the circumstances. What is proper in one situation or under one set of circumstances may be improper in another set of circumstances.
>
> *Because it also means in violation of accepted standards of what is right or proper. So the noises have to be loud and in violation of accepted standards of what is right or proper. Loud and improper noises, that can mean speech. Because there has to be a balancing of one's right to express himself and other's right to be free from disruption.*
>
> *Now the method here is what is being tested not the words. We do know that and there's no reason to keep on it. But it is not the content of Mr. Eanes' speech. There can be no chilling of that right to express what one believes. So it's not the content that is being judged or can be judged by any governmental agency. The manner, however, can be subject to restriction. And the statute here is a method of governmental ... restriction of the manner in which somebody expresses his views. Because it cannot be loud and unseemly. That is the manner, loud and unseemly.* [emphasis supplied]

Having found Eanes to be loud, Judge Wright went on to find specifically that Eanes actually disturbed both residents and area business people and that he was aware that his manner of communication was disruptive to the neighborhood. He then concluded that Eanes was "guilty of willfully disturbing the peace and tranquility of that particular neighborhood during the morning of May the 18th, [1988] by making loud and otherwise unacceptable improper under the circumstances noises."

We hold, in view of Judge Wright's exposition of § 121, that he properly construed "loud and unseemly noise" to apply only to an improper volume level of speech and not to its content. He further correctly concluded that noise that was "loud and unseemly" was noise that was unreasonably loud under the circumstances – among those circumstances being the fact that the noise produced by Eanes unreasonably disturbed members of a captive audience who were entitled to be free of that sort of disturbance. In other words, Judge Wright properly balanced Eanes's first amendment rights against a substantial public interest protected by a narrowly drawn, content-neutral regulation. Eanes was warned to lower his voice by a police officer whose action was based on complaints from members of the captive audience. Eanes chose not to comply. Under these circumstances, he was properly convicted of a violation of the statute.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY PETITIONER.

ELDRIDGE, Judge, dissenting.

The First Amendment to the Constitution of the United States sets forth "the sweeping command"[1] that government "shall make no law ... abridging the freedom of speech...." In this case, however, apparently for the first time ever, a state's highest court has upheld a criminal conviction based solely on the loudness of a single individual in delivering constitutionally protected speech with an unamplified human voice, in a permitted place and at a permitted time. In affirming Jerry Wayne Eanes's conviction under a statute which penalizes disturbing neighborhoods "by loud and unseemly noises," the

[1] *Abrams v. United States*, 250 U.S. 616, 631, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting).

majority has construed and applied that statute in a manner inconsistent with the First Amendment. Moreover, in applying a novel construction of the statute to Eanes, the majority has violated his rights under the Due Process Clauses of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights.

I.

The Court's opinion points out that this case arose in the context of an anti-abortion demonstration which took place on the public sidewalk in front of the Hagerstown Reproductive Health Services Clinic on May 18,1988. Petitioner Eanes had, however, preached there before. On July 1, 1987, when Eanes was engaged in preaching identical to that of May 18,1988, Hagerstown police officers arrested him and charged him under Maryland Code (1957, 1987 Repl.Vol.), Art. 27, § 122. That section establishes criminal penalties for "[a]ny person ... who shall wilfully act in a disorderly manner by making loud and unseemly noises . . . on or about any public place...." On May 17,1988, only one day prior to the activity which is the subject of this appeal, the Circuit Court for Washington County (Moylan, J.) granted Eanes's motion for judgment of acquittal. The court found that Eanes's preaching was "extremely loud, very loud, certainly above the hubbub and noise of the busy street" and that "the particular means that they [Eanes and his fellow preachers] were doing" were "disturbing to the business people who had their businesses nearby." The court held, however, that under *Diehl v. State*, 294 Md. 466, 472-473, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 363 (1983), the phrase "loud and unseemly noises" could encompass communications made in a loud manner only if they presented a clear and present danger of violence, or were not intended as communications but merely as a guise to disturb other persons. The court further held that Eanes's speech was constitutionally protected under principles set forth in United States Supreme Court opinions.

The day after his acquittal, Eanes returned to the public sidewalk in front of the clinic and resumed his preaching. A police officer, after receiving a complaint, requested that Eanes lower his voice. The officer then left the scene, later explaining at trial that

> "[t]here was a confusion among my supervisors in reference to a decision handed down by Judge Moylan the

> previous day and we were advised by Captain Hart to leave the area until we got a ruling from the State's Attorney's office."

After receiving another complaint about the preaching in front of the clinic, the officer returned and

> "was advised that the State's Attorney stated that Moylan's decision was in reference to that case only, that if anybody was disturbing the peace and I had probable cause to make an arrest to go ahead and make an arrest."

The officer arrested Eanes and charged him under Art. 27, § 121. That section, as previously indicated, provides criminal penalties for "[a]ny person ... who shall willfully disturb any neighborhood in [any Maryland] city, town or county by loud and unseemly noises...."

On December 15,1988, the Circuit Court for Washington County (Wright, J.) found Eanes guilty of violating § 121.

This Court affirms the conviction by adopting a new construction of § 121, and by retroactively applying that construction to Eanes's speech. Despite the language of the statute which, as pointed out by Judge Wright below, treats "loud" and "unseemly" as separate elements, the majority today reads the word "unseemly" as a modifier of "loud." The Court holds that the "unseemly loud" noise proscribed by the statute includes unamplified political speech protected by the First Amendment, even if the speech was not likely to incite a breach of the peace.[2]

Furthermore, the Court initially states that § 121 "is not a regulation of time or place. ... As the State correctly contends, § 121 is a regulation on the manner of expression. It serves to limit, under proper circumstances, the loudness of the delivery of the communication." Majority opinion, p. 610. Later, however, the Court treats the statute as regulating in part time and place, for it says that "[o]ne speaking on West Washington Street at midnight ... could run afoul of § 121 at a lower level of voice volume." *Id.* at 613.

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[2] But cf., *Diehl v. State*, 294 Md. 466, 472, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 363 (1983).

In the context of the present case, however, the majority holds that Eanes committed a crime solely because of the volume level of his speech, and not because it was delivered at the wrong time or the wrong place. If Eanes's unamplified speech was too loud for the public sidewalk in the heart of downtown Hagerstown at 10:30 a.m. on a weekday, I cannot imagine any time in any neighborhood in this State where he could lawfully reach the same volume.

In addition to construing "loud and unseemly" to mean "unreasonably loud," the majority adds elements to the statute which go beyond anything suggested by the statutory language, legislative history, or case law. The Court holds that "the application of § 121 ordinarily requires prior warning by police authority...." The Court also "hold[s] that police may act under this statute only upon receipt of a complaint from an affected citizen upon the basis of which the officer reasonably believes that the statute has been violated." (Majority opinion, pp. 617-618).

II.

In my view, the First Amendment prohibits the State from punishing Eanes for speaking against abortion on a public sidewalk in Hagerstown under the circumstances of this case. The relevant clause of Art. 27, § 121, as construed by the Court today, may not be validly applied to one in Eanes's position under the Supreme Court's First Amendment decisions.

A.

At the time of his arrest, Eanes was engaged in free speech in its "most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963). He was standing on a public sidewalk outside the clinic on West Washington Street, a congested, one-way thoroughfare, probably the busiest street in downtown Hagerstown. It is U.S. Route 40 West. He was in a commercial area, a block and a half from the city's public square. Between 10:30 a.m. and noon, he and another man, who were part of a group of several protesters, alternately spoke "to preach the gospel of Jesus Christ" and to "speak out against abortion" with their unamplified human voices.

Eanes was expressing his opposition to abortion, one of the most controversial political and social issues today. Unlike many other cases involving protests at abortion clinics, *there is no contention in this case that Eanes attempted to block access to the clinic*. He did not trespass on clinic property, did not threaten anyone, did not incite listeners to violence, and did not use profanity, obscenity or "fighting words." Moreover, there was neither a finding nor any evidence that Eanes's speech disrupted any medical procedures at the clinic.[3] Unamplified speech, on a public sidewalk in a commercial area, about a controversial political and social topic, was Eanes's only activity.

Eanes preached his anti-abortion message in the most appropriate place and at the most appropriate time. Yet today the majority has construed and applied Art. 27, § 121, in a manner that makes the delivery of the speech a crime.

In holding that Eanes, standing on a public sidewalk adjacent to a busy street, may be punished for speaking against abortion, the majority relies on testimony that "Eanes could readily be heard above the traffic noise," although the majority acknowledges that the testimony as to this was conflicting. The only meaningful exercise of the First Amendment right to free speech under the circumstances, however, is if the speaker is allowed to speak above the traffic noise. As the majority acknowledges, public streets and sidewalks have been repeatedly recognized as archetypes of traditional public forums. The government's ability to restrict expressive activity in such places "which occupy a 'special position in terms of First Amendment protection'" is "'very limited.'" *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988), quoting *United States v. Grace*, 461 U.S. 171, 177, 180, 103 S.Ct. 1702, 1707, 1708, 75 L.Ed.2d 736 (1983). Permitting on public sidewalks only speech which cannot be heard because of the surrounding traffic noise gives little effect to this "special position in terms of First Amendment protection."

The majority opinion also relies heavily upon testimony that, allegedly because of Eanes's speech, an adult and a child in nearby apartments could not sleep and some workers nearby were "disturbed"

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[3] The only testimony concerning the effect of Eanes's speech at the clinic was by the clinic administrator, who stated that she personally was disturbed and was having difficulty hearing.

and had difficulty concentrating on their work. It must be emphasized, however, that Eanes's speech was not delivered in a residential neighborhood and was not delivered at a time when most people are sleeping. Of course, some people do reside in commercial and even in industrial areas, and some people do need to sleep during the day. Furthermore, some people are "disturbed" and may lose concentration because of any sound out of the ordinary. If constitutionally protected speech is limited to that not objected to by such persons, the scope of the First Amendment's free speech clause is extremely narrow.

For example, speeches by public officials at an outdoor ceremony on the grounds of the Maryland State House in Annapolis may wake up persons sleeping in apartments above stores on State Circle; the speeches might affect the concentration of workers in the stores. If so, would the continuation of the speeches at the same volume, after a complaint and warning by an Annapolis policeman, be criminal? Are demonstrations outside of the State House, when the Legislature is in session, to be suppressed by criminal prosecution if the crowd becomes noisy and causes complaints from persons trying to sleep?[4] Presumably under today's decision, if Art. 27, § 121, is to be enforced without discrimination, they would.

The First Amendment would seem to preclude reducing speakers and the listening public to speech which does not disturb daytime sleepers in a downtown commercial area. *Cf. Butler v. State of Michigan*, 352 U.S. 380, 383-384, 77 S.Ct. 524, 526,1 L.Ed.2d 412 (1957) ("The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual ... that history has attested as the indispensable condition for the maintenance and progress of a free society").

In light of the Court's application of Art. 27, § 121, to the facts of this case, I fail to see what would stop a policeman from using the statute to "quiet" a preacher who delivers a loud sermon from inside

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[4] *See The Sun* (Baltimore, January 16, 1990) p. 2B (reporting on a rally outside of the State House by abortion opponents, and stating (emphasis added), "But the crowd, *though noisy*, was cheerful and peaceful, and dispersed after hearing such anti-abortion speakers as Mr.[Alan L.] Keyes, former Lt. Gov. Samuel W. Bogley and state Sen. Francis X. Kelly,..."). *See also The Capital* (Annapolis, January 16, 1990) p. 1 (describing the noise at the rally).

a church that lacks air conditioning and has open windows in the summer. Such preaching, or perhaps the enthusiastic singing of the congregation, could reach the same volume level that "disturbed" the residents near the clinic. I also fail to understand what would stop an elected mayor from using § 121 to "quiet" a political opponent from delivering a loud but unamplified campaign speech at the Hagerstown public square, located only a block and a half from where Eanes was preaching. Such a speech could disturb the very same "captive auditors in their homes and places of businesses" who were "an unwilling congregation for Eanes's street-preaching."

When a particular speech is unpopular or unusual, I doubt that it will be difficult to find an affected citizen to complain, ostensibly because of the sound level. *See Saia v. New York*, 334 U.S. 558, 562, 68 S.Ct. 1148, 1151, 92 L.Ed. 1574 (1948) ("Annoyance at ideas can be cloaked in annoyance at sound"). At Eanes's trial, the woman who testified that her child could not sleep because of the preaching stated: "I really can't say whether it [the traffic noise on West Washington Street] did or did not [bother her child's sleep].... I mean the traffic was something that we lived with every day." This testimony demonstrates how complaints because of sound may depend on individual sensibilities. People who live in the commercial area of downtown Hagerstown, and sleep at 10:30 a.m., may get used to the traffic noise on West Washington Street. A speech on abortion, at a sound level merely sufficient to be heard, may disrupt and draw complaints from those same people who may not be used to it, or may not like it. The First Amendment, however, protects speakers from these individual sensibilities of their fellow citizens. *Saia v. New York*, *supra*.

While holding that one may be criminally punished for unamplified speech on a political or social issue, if the speech disturbs others and generates complaints, the majority apparently would not apply its holding of criminality to the operators of machines and other equipment which may make greater noise and cause greater disturbance. The Court's opinion states (p. 613): "Road construction equipment, for example, may make a great deal of noise and may seriously disturb people in homes, hospitals, schools, and offices. But broken water mains must be repaired and streets must be maintained, and it is often the case that noisy machines are the only practicable means

of achieving these objectives." Because, in the majority's view, one desiring to give a speech on a political or social issue has the option of refraining from speaking and using "placards or leaflets," the majority places more importance upon the maintenance of streets than upon free speech. Under the majority's application of Art. 27, § 121, apparently only those persons desiring to exercise their First Amendment right to make speeches need fear prosecution under the statute. Those engaged in other endeavors producing a high volume of sound, such as operating noisy equipment, are apparently doing something more important and thus are exempt from the criminal statute.

The majority's insensitivity to Eanes's free speech rights is also illustrated by its assertion that "[s]ound is one of the most intrusive means of communication." The majority has overlooked that sound, in the form of the spoken word, is the most basic thing protected by the First Amendment. *See Texas v. Johnson*, ___ U.S. ___, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989) ("The Government generally has a freer hand in restricting expressive conduct than it has in restricting the .... spoken word"). Merely because a speaker on a public sidewalk along a busy street needs to speak loudly to be heard above the surrounding noise, or merely because he attains a high level of sound because of the fervor with which his beliefs are held, does not justify the suppression of his speech. As Professor Chafee stated over 60 years ago, repeating an earlier thought by Judge Cooley, "you cannot limit free speech to polite criticism, because the greater a grievance the more likely men are to get excited about it, and the more urgent the need of hearing what they have to say." Zechariah Chafee, *Freedom of Speech in War Time*, 32 Harv.L.Rev. 932, 961 (1919). *See* T. Cooley, *Constitutional Limitations* 613-614 (7th ed. 1903) ("The heat of the discussion will generally be in proportion to the magnitude of the evil as it appears to the party discussing it").

The First Amendment "is a declaration of national policy in favor of the public discussion of all public questions." Chafee, *supra*, at 934. Mr. Eanes's public discussion of abortion, at a permitted place and permitted time, without obstructing, trespassing, or hindering anyone, and without any sound amplification devices, was protected by the national policy embodied in the First Amendment.

B.

The majority argues that § 121's clause relating to "loud and unseemly" noises, as construed and applied by the Court today, is valid under the Supreme Court's First Amendment cases and justifies an affirmance of Eanes's criminal conviction. I disagree. The very cases relied on in the majority opinion undermine the majority decision.

The Court emphasizes that, under its construction of § 121, the statute's regulation of speech is "content-neutral." Theoretically this may be true. Nevertheless, as previously indicated, authorizing policemen to arrest a speaker, where the speaker is simply using his unamplified voice at a permitted time and place, on the sole ground that the speech is "too loud" and therefore disturbing to others, gives complainants and police authorities a powerful weapon which can easily be misused to suppress speech because of its content and because of the identity of the speaker. More traditional or "acceptable" speeches by public officials or prominent persons will rarely, if ever, lead to arrests, regardless of the volume level of speech. Mavericks may regularly have problems with the police.

The majority acknowledges that even "content-neutral" regulations of speech, to be valid under the First Amendment, are subject to stringent requirements. A State may "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983). *See, e.g., Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989); *Frisby v. Schultz*, 487 U.S. 474,108 S.Ct. 2495, 2500, 101 L.Ed.2d 420, 429 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984), and cases there cited. The pertinent clause of § 121, as now construed and applied by this Court, is not a narrowly drawn time, place or manner regulation, tailored to serve a significant government interest, and leaving ample alternative channels of communication. Instead, it is overbroad and vague.

(1)

Initially, the majority invokes the principle that the government has an interest in protecting its citizens from unwelcome noise, and it relies on *Ward v. Rock Against Racism, supra*, 109 S.Ct. at 2756; *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); *Saia v. New York, supra*, 334 U.S. at 562, 68 S.Ct. at 1150-1151; and *Reeves v. McConn*, 631 F.2d 377 (5th Cir.1980). These cases, however, dealt with sound amplification devices; they indicate that narrowly drawn regulation of amplified sound is permissible. The cited cases do not countenance broad regulation of unamplified speeches.

The Supreme Court has never held that the government has a legitimate interest in controlling the volume of unamplified political or social speech delivered in an appropriate place and at an appropriate time. Indeed, the cases have suggested otherwise.

The Supreme Court first confronted the relationship between the First Amendment and amplification devices in *Saia v. New York, supra*, 334 U.S. 558, 68 S.Ct. 1148, where a local penal ordinance forbade the use of sound amplification devices without the permission of the Chief of Police. The appellant, a Jehovah's Witnesses' minister, received a permit to use sound equipment to amplify lectures on religious subjects in a public park on Sundays. After the permit expired, his request for another one was denied on the ground that complaints had been made. When he subsequently used his equipment anyway, he was arrested and convicted. The state presented witnesses at trial who, like the witnesses at Eanes's trial, testified that they were annoyed by the sound, although not by the content, of his speeches. The Supreme Court, holding the ordinance unconstitutional, stated that the ordinance prescribed no standards for the exercise of the Chief of Police's discretion, nor was it "narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted." 334 U.S. at 560, 68 S.Ct. at 1149. Noting that loud-speakers "are today indispensable instruments of effective public speech," the Court concluded that abuses created by loud-speakers would have to be controlled by narrowly drawn statutes, saying in language quite pertinent here (334 U.S. at 562, 68 S.Ct. at 1150-1151):

> "The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.
>
> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice."

In the instant case, even if Eanes had used a loudspeaker, it is questionable whether § 121, as construed by the majority, could be constitutionally applied to him in light of the above holding in *Saia*. Section 121, as formulated by the Court today, is no more narrowly drawn than the ordinance in *Saia*. It does not specify permitted times, places, or decibels. The only standard to guide the "police authority," who must initially give the "prior warning" under the majority's construction of the statute, is whether a complaint has been made and whether the police officer believes that the sound is unreasonably loud.[5] The majority, employing broad and vague standards which perhaps could not constitutionally be applied to amplified sound, uses such criteria to suppress unamplified speech.

One year later, in *Kovacs v. Cooper, supra*, 336 U.S. 77, 69 S.Ct. 448, the Supreme Court upheld a Trenton, New Jersey, ordinance barring sound trucks from "broadcasting in a loud and raucous manner." The appellant had used a sound truck to broadcast music and

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[5] The "prior warning by police authority" which the majority has engrafted on Art. 27, § 121, might be analogized to the police refusal to renew the permit in *Saia*.

comment on a labor dispute. The opinion of three justices, announcing the judgment of the Court, pointed out that the ordinance applied only to vehicles, only to those with a sound amplifier and only to those operating on the streets. The opinion emphasized that sound trucks could still be utilized "in places such as parks or other open spaces off the streets." 336 U.S. at 85, 69 S.Ct. at 452. The plurality opinion also indicated that absolute prohibition of sound amplification devices in the city would be "probably unconstitutional." 336 U.S. at 82, 69 S.Ct. at 451. The opinion noted that in a city like Trenton, sound trucks blaring on the streets "would be dangerous to traffic...." 336 U.S. at 87, 69 S.Ct. at 453. In concluding, the opinion specifically addressed unamplified human speech which the ordinance did not prohibit (336 U.S. at 89, 69 S.Ct. at 454, emphasis added):

> "There is no restriction upon the communication of ideas or discussion of issues *by the human voice*, by newspapers, by pamphlets, by dodgers."

In concurring, Justice Frankfurter drew the following distinction (336 U.S. at 96, 69 S.Ct. at 458, emphasis added)

> "Only a disregard of vital differences between natural speech, *even of the loudest spellbinders*, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice."

The ordinance in *Kovacs* was more narrowly drawn than § 121 as construed by the Court today; the *Kovacs* ordinance was limited to vehicles, was limited to sound amplification devices, and permitted the sound trucks in certain places. More importantly, however, the Supreme Court clearly drew a distinction between amplified sound and the unaided human voice.

The majority relies on a recent Supreme Court sound amplification case, *Ward v. Rock Against Racism, supra*, which concerned a challenge to "use guidelines" for a bandshell in New York City's Central Park. The regulations required bandshell performers to use sound-amplification equipment and a sound technician provided by the city. Rock Against Racism had previously sponsored programs where it furnished the equipment and technician. The city asserted two justifications for its guidelines. The first was to control noise levels at bandshell events, in order to retain the character of a quiet area of

Central Park and avoid undue intrusion into nearby residential areas. The second was to ensure the quality of sound at bandshell events.

Again, the regulations in *Ward* were much more narrowly drawn and specific than Art. 27, § 121. The *Ward* regulations specifically applied to a bandshell, in a particular location, and owned by the city. Moreover, sound amplification equipment was not proscribed; it merely had to be supplied by the city. Finally, the *Ward* regulations dealt with amplified noise, not unamplified speech on political and social issues.

The majority also cites *Reeves v. McConn, supra*, 631 F.2d 377, for the proposition that a "city may protect citizens from unreasonable or disruptive levels of noise in streets." When the United States Court of Appeals for the Fifth Circuit considered a petition for rehearing, 638 F.2d 762 (5th Cir.1981), however, it recognized the distinction between unaided and amplified sound. The court faced a challenge to an ordinance that prohibited the "amplification" of "obscene" words or sounds. After accepting a construction of "obscene" that extended beyond erotic words and included "indecent" words, the court reasoned that a "sensible balance of these competing rights [speech and a right to have 'a reasonable means of avoidance'] is to protect the speaker of obscene or indecent words only when he uses the unamplified voice...." *Id.* at 764. Instead of supporting the majority's decision in the instant case, *Reeves* points the other way.

Despite the majority's refusal to draw a distinction for First Amendment purposes between amplified sound and unamplified speech, it is clear that there is a constitutionally significant difference between the two.

(2)

Many other cases, including ones relied on by the majority, demonstrate that the majority's decision cannot be squared with First Amendment principles.

Several Supreme Court cases undermine the majority's position that mere loudness, accompanied by complaints and warnings, is sufficient to justify the suppression of unamplified political speech. In *Edwards v. South Carolina, supra*, 372 U.S. 229, 83 S.Ct. 680, the Supreme Court reversed the breach of the peace convictions of 187

student demonstrators. At noon the demonstrators walked to the South Carolina State House grounds, an area of two city blocks open to the public, to protest racial discrimination in the state. For thirty to forty-five minutes, they marched and carried placards as a crowd of 200 to 300 onlookers gathered on adjacent sidewalks. After apparently some complaints,[6] and after being warned by police authorities that they would be arrested if they did not disperse within fifteen minutes, one of the leaders delivered a "religious harangue" and the demonstrators loudly sang while stamping their feet and clapping their hands. The noise level caused by the 187 demonstrators, as described in the Supreme Court's opinion, was certainly greater than Eanes's speech. The Supreme Court stated (372 U.S. at 233, 83 S.Ct. at 682):

> "Instead of dispersing, the petitioners engaged in what the City Manager described as 'boisterous,' 'loud,' and 'flamboyant' conduct, which, as his later testimony made clear, consisted of listening to a 'religious harangue' by one of their leaders, and loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail."

The Court in *Edwards*, using language fully applicable to the present case, distinguished the situation before it from a conviction under a narrowly drawn regulatory statute (372 U.S. at 236, 83 S.Ct. at 684):

> "We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgement that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case."

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[6] *See* 372 U.S. at 232 n. 6, 83 S.Ct. at 682 n.6.

After pointing out that the First and Fourteenth Amendments do "not permit a State to make criminal the peaceful expression of unpopular views," the Court (372 U.S. at 237-238, 83 S.Ct. at 684-685) repeated its earlier language from *Terminello v. City of Chicago*, 337 U.S. 1, 4-5, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949):

> "'[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech * * * is * * * protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. * * * There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.'"

Two years later, in *Cox v. State of Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), the Supreme Court reversed the convictions of a civil rights demonstration leader for, *inter alia*, disturbing the peace. Cox had led about 2,000 students in a march to the courthouse in downtown Baton Rouge, Louisiana, to protest against discrimination and the previous day's arrest of twenty-three fellow students. At the noon demonstration, the students carried signs, sang songs and pledged allegiance to the flag. The demonstrators began to cheer loudly and clap when the twenty-three student prisoners began to sing from their cells. After Cox encouraged the group to sit-in at stores that would not serve meals to blacks, the sheriff ordered the demonstrators to break up. They refused and were dispersed by tear gas. Authorities arrested Cox the next day. The Supreme Court viewed a film of the events and concluded that the "singing and cheering do not seem to us to differ significantly from the constitutionally protected activity of the demonstrators in *Edwards*...." 379 U.S. at 548, 85 S.Ct. at 460. In answering Louisiana's contention that

the convictions should be sustained because of fears expressed by some witnesses that violence would erupt, the Court again pointed to *Terminello.*

Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), is relied on by the majority in the instant case to support its concern for the well being of a "captive audience," and to support its conclusion that sound "is one of the most intrusive means of communication." Yet *Grayned* demonstrates the relevance of *Edwards* and *Cox* to the facts before us today. In *Grayned*, an Illinois antinoise ordinance forbad people, while on ground adjacent to a school building, from making noises or diversions that disturb the peace or good order" of a school session or class. In holding that the ordinance was sufficiently narrowly tailored, and not unconstitutionally vague or overbroad, the Supreme Court emphasized that the ordinance was limited to grounds adjacent to a school building, was limited to times when school was in session, and, as construed by the Supreme court of Illinois, was limited to prohibiting "actual or imminent interference with the 'peace or good order' of the school." 408 U.S. at 111-112, 92 S.Ct. at 2301. Even with these specific time, place and manner limitations, the *Grayned* Court at one point stated that "the question is close" as to whether the ordinance was "impermissibly vague." 408 U.S. at 109, 92 S.Ct. at 2299.

The statute under which *Eanes* was convicted, as construed by the majority today, has none of these time, place and manner limitations. Although the majority of this Court seems to believe that the requirement of a prior police warning helps to narrow the regulation of speech, the Supreme Court in *Grayned* indicated that police discretion in determining whether con duct was proscribed contributes to rendering a statute impermissibly vague. *Ibid.*

Furthermore, in upholding the ordinance the *Grayned* opinion drew a sharp distinction between noisy demonstrations adjacent to a school and noisy demonstrations elsewhere (408 U.S. at 120, 92 S.Ct. at 2305)

> "Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times, cf.

> *Edwards v. South Carolina*, 372 U.S. 229 [83 S.Ct. 680, 9 L.Ed.2d 697] (1963); *Cox v. Louisiana*, 379 U.S. 536 [85 S.Ct. 453, 13 L.Ed.2d 471] (1965), but next to a school while classes are in session, it may be prohibited. The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty 'audience' enters and leaves the school."

The Supreme Court clearly indicated that "noisy demonstrations that disrupt" constitute speech which enjoys constitutional protection in at least some places and some times. The majority's construction and application of Art. 27, § 121, totally ignores these words.

At Eanes's May 17, 1988, trial, Judge Moylan noted that *Edwards* "bears a resemblance to this case." He also stated that the issue in *Cox* was "not far removed from the issue or type of activity here.... There is simply the exercise by citizens of their First Amendment right." As previously indicated, the speech for which Eanes stands convicted was undoubtedly no louder than the cheering, clapping, and singing of 187 demonstrators in South Carolina whose convictions were reversed in *Edwards*. The "captive audience" in downtown Baton Rouge, Louisiana, would not have even heard Eanes amidst the singing and cheering of 2,000 demonstrators involved in *Cox*. It is difficult for me to believe that the Supreme Court would have sustained convictions in *Edwards* and *Cox* based on broad statutes proscribing "unseemly loud" noises.

Edwards, Cox, and *Grayned*, read together, make it clear that authorities cannot invoke a general disorderly conduct statute like Art. 27, § 121, to suppress a speech simply because it is noisy.

C.

A state's interest in protecting its citizens from unwelcome noise may justify some narrowly drawn time, place and manner regulations of noise. No such regulations are being applied in the case at bar.

The relevant clause of Art. 27, § 121, does not itself contain any time or place regulations. While the majority's construction of the statute and reference to the "circumstances" might embody a vague time and place component applicable in another case, *e.g.*, a speech at midnight or in a residential neighborhood, no time or place regulation

is applicable in the present case. Concededly Eanes's speech was at a permitted time and a permitted place.

The majority believes that its formulation and application of the "unreasonably loud" standard, coupled with the need for a complaint and prior police warning, is a specific regulation of the "manner" of speech, and "is sufficiently narrowly tailored" to be valid under First Amendment principles. Neither reason nor case law supports this position.

The standard adopted by the majority is, on its face, a vague one. As previously discussed, it lacks the objective specificity of the regulations of sound involved in cases such as *Kovacs v. Cooper, supra; Grayned v. Rockford, supra; Ward v. Rock Against Racism, supra; Reeves v. McConn, supra*; and others. For example, the *Kovacs* standard, in addition to the limitation "loud and raucous," applied only to vehicles, only to amplified sound, and only to streets. The *Grayned* standard had express time and place limitations, coupled with a much more specific manner limitation, namely actual or imminent interference with the operations of the school.[7] The regulation in *Ward* applied to a particular bandshell, in one specific location, and to amplified noise. No case cited by the majority, and no case of which I am aware, upholds the suppression of unamplified political speech, at a permitted time and place, under a vague "unreasonably loud" standard.[8]

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[7] *See also Portland Feminist Women's Health Center v. Advocates For Life, Inc.*, 859 F.2d 681, 684 (9th Cir.1988), where the United States Court of Appeals for the Ninth Circuit r considered a constitutional challenge to a preliminary injunction against "shouting, screaming, chanting, or yelling during on-site demonstrations outside a clinic that provided abortion services. While the court concluded that a state can regulate disruptive expression outside a clinic where medical services are offered, it affirmed the lower court only after modifying the injunction to forbid a volume that substantially interferes with the provision of medical services within the Center...." 859 F.2d at 686-687.

As previously noted, in the instant case there were neither findings nor any evidence that Eanes's speech interfered with medical services at the clinic, and the majority docs not require this under its construction of the statute.

[8] The majority argues that, to be valid, a regulation of noise need not specify the permitted and prohibited sound levels by decibels. I agree. Nevertheless, regulations of speech which do not specify decibels, and which have been upheld by the courts,

Further contributing to the vagueness of Art. 27, § 121, are the different meanings which the majority ascribes to the statutory phrase "loud and unseemly." As I understand Part III A of the majority opinion, if the complaint (or perhaps the theory of the prosecution – I am not sure which) about a speech relates to its content, then the phrase "loud and unseemly" means speech advocating "imminent lawless action and . . . likely to incite a breach of the peace." On the other hand, if the complaint purportedly does not concern the content of the speech, then the words "loud and unseemly" mean "the volume level of protected speech" (majority opinion, p. 608). This is a great deal of flexibility for three little words. How such flexibility can be deemed to constitute a "narrowly tailored" regulation of speech is beyond my comprehension.

In addition the statute, as construed by the majority, obviously suffers from overbreadth, as "its reach ... prohibits constitutionally protected conduct." *Grayned v. Rockford, supra*, 408 U.S. at 114, 92 S.Ct. at 2302. As discussed earlier, the standard employed by the majority would encompass peaceful but noisy demonstrations at the State House, like those involved in *Edwards v. South Carolina, supra*, and like those which regularly occur in Annapolis. The majority's standard would prohibit peaceful but noisy civil rights demonstrations in downtown areas, similar to those deemed constitutionally protected in *Cox v. Louisiana, supra*. The recent non-violent anti-government demonstrations in Eastern Europe, which have been generally praised in this country, would undoubtedly have constituted criminal activity if they had occurred in Maryland, under the test employed by the majority. The examples of protected First Amendment activity, potentially encompassed by the standard being applied to Eanes's speech, are endless.

In *State v. Swoboda*, 658 S.W.2d 24 (Mo. 1983), the Supreme Court of Missouri held that a statute proscribing "unreasonably and knowingly causing alarm to another person or persons not physically on the same premises by ... [l]oud and abusive language" was unconstitutionally overbroad. Using language that is quite apt in the present

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have contained other specific time, place or manner criteria. In the absence of sufficient other criteria, a specification of decibels might help, depending upon the circumstances. *See Saia v. New York*, 334 U.S. 558, 562, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574 (1948).

case, the Supreme Court of Missouri emphasized that the statute "can encompass virtually any expletive unreasonably and knowingly uttered at high volume and with high intensity, so long as a complainant is alarmed; vehement political discussion obviously contemplated by the first amendment could fall within the statute's proscription." *Id.* at 25.

The complaint and police warning requirements, which the majority today engrafts upon the legislative enactment, do not transform the majority's "unseemly loud" standard into a permissible narrowly tailored time, place or manner regulation of speech. If anything, the complaint and warning requirements may exacerbate the First Amendment problems.

Preliminarily, complaints and prior warnings by authorities have been present in many of the Supreme Court's cases dealing with regulations of activity protected by the First Amendment. The Court has not, to the best of my knowledge, given any weight to these factors in determining whether the regulation was constitutionally valid. *See, e.g., Edwards v. South Carolina, supra.*

Any time government authorities desire to suppress activity protected by the First Amendment, it will not be difficult for them to find complainants and to give prior warnings. The complaint and warning requirements add nothing to specificity. Whatever protection they might seem to provide against government overreaching is illusory.

Moreover, by making a complaint and a prior police warning statutory elements, the majority opens the door to discriminatory enforcement of Art. 27, § 121. Thus, if two speakers, at about the same time of day and in similar neighborhoods, reach the same volume, and persons complain only about one of them, a police officer can use § 121 only against the speaker who was the object of the complaints. While the complaints may be couched in terms of loudness, it is quite likely that the speech with "offensive" content will generate complaints and the speech with popular content, or by a popular speaker, will not.

Similarly, the prior police warning requirement may lead to the suppression of speech when there are policemen nearby, but if policemen do not happen to be in the area to give warnings, speech of

comparable loudness, at the same times and places, will be exempt from the criminal statute. It is wholly irrational to make the violation of a criminal statute dependent upon the presence or absence of a police officer when the conduct takes place.

Furthermore, the prior warning requirement vests police officers with too much discretion to quell First Amendment protected activity. Empowering policemen to warn speakers, without any specific criteria, could lead to routine warnings having a chilling effect upon free speech. Also, provision of clear and explicit standards to guide law enforcement officers are necessary to prevent arbitrary and discriminatory enforcement. *Smith v. Goquen*, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford, supra*, 408 U.S. at 108-109, 92 S.Ct. at 2298-2299. This is particularly true when First Amendment activity is at stake. In *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771(1988), the Court held that a statute giving a mayor unbridled discretion over whether to permit newsracks was unconstitutional on its face. The Court emphasized that standards are needed to provide "guideposts that check the licensor" and make more difficult "post hoc rationalizations" and the use of "shifting or illegitimate criteria." 108 S.Ct. at 2144.

In *City of Houston, Texas v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), the Supreme Court held that a municipal ordinance making it unlawful to "wilfully or intentionally interrupt a city policeman ... by verbal challenge during an investigation" was unconstitutionally overbroad under the First Amendment. The Court emphasized that the ordinance "accords the police unconstitutional discretion in enforcement" for they would be free to arrest whom they chose out of a group of many who violate "plain language" of the ordinance daily. 482 U.S. at 466, 107 S.Ct. at 2512.

As pointed out below in Part III, a person planning to make a speech in a particular manner, at a specific time and place, should be able to determine in advance whether his activity will be a crime. By making the criminality of the activity dependent upon a complaint and police warning, the speaker has no way of knowing in advance whether the delivering of his speech will be a crime. The elements of

complaint and prior warning render the vague "unseemly loud" standard even vaguer.

Finally, the majority's argument that its construction and application of Art. 27, § 121, allows for ample alternative avenues of communication is unpersuasive. Cases upholding narrowly tailored regulations of activity protected by the First Amendment have not required persons to forego the most basic form of free speech and choose less direct methods. Thus, the defendant in *Kovacs v. Cooper, supra*, 336 U.S. at 89, 69 S.Ct. at 454, faced "no restriction upon the communication of ideas or discussion of issues by the human voice...." Eanes is not so fortunate. He must pursue less direct methods of communication, even though there was no finding by the trial court that he could have conveyed his message by alternative means without disturbing others. *See also City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812,104 S.Ct. 2118, 2132-2133, 80 L.Ed.2d i72 (1984), on which the majority relies, but where the Supreme Court noted that the sign control ordinance there involved "does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited," and where the Court emphasized the findings of the trial court that there were ample alternative channels of communication.

Making a speech on a public sidewalk, with the unamplified human voice, is the one form of communication in which virtually all of our citizens may engage, as it does not ordinarily involve expenditures of money. Many who have a message, and wish to convey it in accordance with their First Amendment right, may not be able to afford printing literature, making signs, the postage involved in mailings, telephoning, and the other "alternative means" suggested by the majority. I flatly reject the majority's view that, because of "alternative means," suppression of an unamplified sidewalk speech on a political or social topic "is of little consequence" (majority opinion, p. 615).

III.

Apart from the violation of Eanes's First Amendment rights, the majority's affirmance of his criminal conviction is inconsistent with basic principles of due process embodied in the Fourteenth Amendment and Art. 24 of the Maryland Declaration of Rights.

A.

In addition to the constitutional requirement that a regulation of protected speech be "narrowly tailored," considerations of due process mandate that any criminal statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford, supra*, 408 U.S. at 108, 92 S.Ct. at 2298-2299. We require a criminal statute to be sufficiently definite "because we assume that a man is free to steer between lawful and unlawful conduct." *Ibid.*

In *Bowers v. State*, 283 Md. 115, 120, 123, 389 A.2d 341(1978), Judge Levine for the Court stated that "[t]he cardinal requirement is that a penal statute 'be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,'" (quoting from *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). The Court in *Bowers* also emphasized "that whenever a criminal statute may ... impact upon free speech rights, the void-for-vagueness doctrine 'demands a greater degree of specificity than in other contexts,'" (quoting from *Smith v. Goquen, supra*, 415 U.S. at 573, 94 S.Ct. at 1247). *See also In re Leroy T.*, 285 Md. 508, 510-512, 403 A.2d 1226 (1979) (holding that a statute prohibiting the possession of devices "commonly used ... for criminal use" was unconstitutionally vague).

For the reasons already set out in Part II above, the pertinent clause of Art. 27, § 121, as construed and applied by the majority today, does not inform a reasonable person what conduct will render him criminally liable. If one contemplates giving a political speech at noon in the downtown area of a Maryland city, and realizes that to be heard over the traffic noise he will have to use more than a conversational level, I do not know how he determines whether his unaided voice will be deemed "unseemly loud" and generate complaints. The same is true of one contemplating joining a rally of persons clapping and singing outside the State House in Annapolis. Unlike the individual in downtown Trenton, New Jersey, in 1947, who knew that the use of a sound truck on the streets would violate an ordinance and that the use of his unaided voice would be permissible (*see Kovacs v. Cooper, supra*), the Marylander today has no criteria to determine whether his speech will be criminal.

The majority, recognizing that the statutory language as construed does not "provide fair notice," adds a prior police warning requirement.[9] I do not believe, however, that an unconstitutionally vague statute can be salvaged by judicially creating the mechanism of a police warning to operate on a case by case basis. *See Cearfoss v. State*, 42 Md. 403, 407 (1875) ("No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and letter of the statute. Things which do not come within the words are not to be brought within them by construction").

The mandate of due process is that a reasonable person should in advance be able to ascertain whether contemplated conduct violates a statute. It may be permissible in some circumstances for the meaning of a statute to be ascertained from prior reported cases, dictionaries, and other sources, along with the statutory language. *Bowers v. State, supra*, 283 Md. at 125, 389 A.2d at 347. Nevertheless, if a reasonable person cannot determine from these sources whether the contemplated activity is unlawful, the statute is invalid. At the very least, the vagueness cannot be cured by applying the warning requirement in the present case. *See Bouie v. Columbia*, 378 U.S. 347, 352-353, 84 S.Ct. 1697, 1702,12 L.Ed.2d 894 (1964) ("where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute'").

B.

Art. 27, § 121, as construed and applied by the Court today, violates due process in another, although related, respect. While the Ex Post Facto clauses of the federal and Maryland constitutions directly apply only to the acts of legislative bodies, a similar limitation applies to judicial action through the operation of the Due Process clauses.

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[9] The majority opinion, at p. 617, states:

> "Nevertheless, a speaker exercising the legitimate rights of free speech may be unaware that his or her volume has reached a prohibitive level and has become unlawfully disruptive. In order, then, to provide fair notice in a case such as this, we believe that the application of § 121 ordinarily requires prior warning by police authority, so that the speaker is made aware that further communication at the offensive volume level may subject the individual to prosecution."

The Supreme Court, in *Bouie v. Columbia, supra*, 378 U.S. at 352-354, 84 S.Ct. at 1702, explained this principle as follows:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, 62 S.Ct. 237, 239 [86 L.Ed. 226], 'judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.'"
>
> * * * * * *
>
> "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that *aggravates a crime*, or makes it *greater* than it was, when committed.' *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648. [Footnote omitted.] If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

In *Bouie*, the Supreme Court of South Carolina had construed a statute prohibiting "entry upon the lands of another ... after notice from the owner or tenant prohibiting such entry" to proscribe staying upon, as well as entering upon, the land after such notice. The United States Supreme Court concluded that while the construction could be valid for the future, it could not be applied retroactively. 378 U.S. at 362, 84 S.Ct. at 1707.

The Supreme Court in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), reversed convictions for, inter alia, transporting obscene materials in violation of a federal statute. The Court held that due process principles precluded retroactive applica-

tion of new standards announced in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), for distinguishing between hard core pornography and protected First Amendment expression. The *Miller* case had "expanded criminal liability" in replacing the "utterly without redeeming social value" test with the "lacks serious literary, artistic, political, or scientific value" test. *Marks v. United States, supra*, 430 U.S. at 194, 97 S.Ct. at 994. Initially the Court in *Marks* stated (430 U.S. at 191-192, 97 S.Ct. at 992-993):

> "The *Ex Post Facto* Clause is a limitation on the powers of the Legislature, . . . and does not of its own force apply to the Judicial Branch of government. ... But the principle on which the Clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty.... As such, that night is protected by the Due Process Clause of the Fifth Amendment."

The Court went on to emphasize that it had "taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." 430 U.S. at 196, 97 S.Ct. at 995. The Court also emphasized that it was dealing with "sweeping" statutory language, the reach of which "necessarily has been confined within the constitutional limits announced by this Court." 430 U.S. at 195, 97 S.Ct. at 994.

This Court affirms Eanes's conviction under a new construction of Art. 27, § 121, which goes far beyond the construction of the statute set forth in *Diehl v. State, supra*, 294 Md. 466, 451 A.2d 115, and earlier cases. In addition, today's construction concededly adds new elements to the statute. This Court's action is clearly inconsistent with the due process principle applied in *Bouic v. Columbia, supra; Marks v. United States, supra*; and many other cases.

In *Diehl v. State, supra*, a police officer named Vincent Gavin heard and saw the operator of an automobile squealing wheels on Main Street in Hancock, Maryland, at 10:25 p.m. He pulled the vehicle over in a supermarket parking lot and noted that it contained several people. When Robert Diehl got out on the passenger's side, Gavin ordered him to return to the vehicle. Gavin testified that Diehl began yelling such phrases as "Fuck you, Gavin"; "I know my rights"; and "You

can't.tell me what to do." After people began to gather, Gavin arrested Diehl for "screaming obscenities ... and drawing a crowd." Diehl fled from the scene. When a state trooper found him half an hour later and dragged him to a police car, Diehl began to kick and scream. The State charged Diehl, *inter alia*, with disturbing a neighborhood by "loud and unseemly noises" in violation of Art. 27, § 121. A jury convicted him of violating that statute and resisting arrest. This Court reversed the convictions. We held, in an opinion by Judge Cole, that "Diehl's speech ... cannot qualify as a *loud and unseemly noise* under the" statute, because, "[a]s speech protected by the First Amendment, Diehl's conduct must have advocated imminent lawless action and been likely to incite a breach of the peace in order to be proscribable by the State." 294 Md. at 472, 451 A.2d at 119.

The majority today states that the *Diehl* test for "loud and unseemly noise" prohibited by the statute applies only where the conviction is based "on allegedly objectionable content," and that where the prosecution is based on "loudness," the statutory phrase means "unreasonably loud." (Majority opinion, Part III A). The majority justifies this reading of *Diehl* by arguing that loudness itself was not an issue in the *Diehl* case. The majority asserts that "[a]t no time did the State argue that the loudness of Diehl's protestations violated § 121." (*Ibid.*).

Preliminarily, I totally disagree with the Court's restrictive view of the issues in *Diehl*. Loudness was an issue in *Diehl*, and the Court there held that loudness itself was not proscribed by the statutory phrase. The *Diehl* opinion specifically referred to the appellant's argument that "mere loudness is not enough to constitute disorderly conduct," 294 Md. at 470, 451 A.2d at 118. The State in its brief in *Diehl* argued that Diehl was both loud in his volume and unseemly in enhancing the prospect of chaos.[10] The State did not argue that the content of Diehl's speech was *per se* unseemly.

Moreover, our opinion in *Diehl* clearly rejected the idea that loudness alone, regardless of content, was prohibited by § 121. In reasoning that Diehl's speech was not prohibited, we pointed out that "his words were chosen to express his outrage" and that "[e]ven the . . . decibel level of this response was a communication that, although

[10] Appellee's brief in *Diehl v. State*, p. 6.

distasteful, should not have been surprising." 294 Md. at 471-472, 451 A.2d at 118. We directly held that "the statute is not intended to prevent [an outraged] citizen from loudly protesting," 294 Md. at 472, 451 A.2d 119. Moreover, in *Diehl* we quoted with approval from a California opinion which the majority today rejects,[11] saying (294 Md. at 473, 451 A.2d at 119):

> "The Supreme Court of California in construing the terminology of a statute regarding 'loud and unusual noise' held in *In re Brown*, 9 Cal.3d 612, 108 Cal. Rptr. 465, 510 P.2d 1017 (1973), *cert. denied, California v. Brown*, 416 U.S. 950, 94 S.Ct. 1959, 40 L.Ed.2d 300 (1974) that
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> > 'The statute, however, cannot be interpreted consistent with the First Amendment and traditional views as making criminal all loud shouting or cheering which disturbs and is intended to disturb persons. [Footnote omitted.] When the word noise in the statute is properly construed consistent with the First Amendment and traditional views, it encompasses communications made in a loud manner only when there is *a clear and present danger of violence or when the communication is not intended as such but is merely a guise to disturb persons*. [*Id.* 108 Cal.Rptr. at 469, 510 P.2d at 1021.] [Emphasis supplied.]'
>
> "The State's evidence failed to establish that Diehl's conduct, under the circumstances here, was unlawful under this first portion of § 121."

Regardless of whether the majority's decision is inconsistent with *Diehl*, it is clear that today's construction of § 121 is an entirely new one. In light of the statutory language, the *Diehl* opinion, and prior cases, neither Eanes nor anyone else could have anticipated the majority's present view of the statute. Until today, there has never been any suggestion that "unseemly" was a modifier of "loud" rather than a separate statutory element. Neither in Maryland nor elsewhere has a disorderly conduct statute worded like § 121 been construed or applied to prohibit protected speech simply because it is deemed

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[11] Majority opinion n. 7.

"unreasonably loud." Lastly, the "statutory" elements of a complaint and prior police warning are admittedly brand new as of today.[12]

To adopt an unanticipated, unprecedented, and unwarranted construction of a criminal statute is bad enough. To apply that construction retroactively to Eanes's conduct is a denial of due process.

In my view, Eanes was entitled to deliver an unamplified speech on the topic of abortion, from a public sidewalk in downtown Hagerstown, during the late morning. To punish as criminal the making of the speech, purportedly because it was too loud, distorts both the statute and our basic constitutional guarantees. Finally, today's holding represents great potential danger for Marylanders speaking on controversial topics.

Judges COLE and BLACKWELL have authorized me to state that they concur with the views expressed herein.

[12] After adding the prior warning requirement to the statute the majority holds that the requirement was met in the present case by the warning that Eanes received from the police officer. Until a policeman's warning was given statutory status by today's opinion, however, a reasonable person in Eanes's position would have put more reliance on the circuit court's decision the day before, acquitting him, than upon a policeman's warning. The "warning" of an officer, from a police force that had arrested him once before, could not have outweighed the security of a circuit court verdict that the statutory language and Constitution would not allow a conviction.

NO. 4166 CRIMINAL APPEALS

IN THE

Circuit Court For
Washington County, Maryland

STATE OF MARYLAND

V.

JERRY WAYNE EANES

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 1
Hagerstown, Maryland
December 15, 1988

The above entitled proceedings came on for trial in open court at 9:40 A.M.

BEFORE:

THE HONORABLE FRED C. WRIGHT, III
Associate Judge

APPEARANCES:

Daniel Dwyer, Assistant State's Attorney for Washington County, Appearing on behalf of the State of Maryland

David A. French, Esquire, Appearing on behalf of the Defendant

Deborah A. Ausburn, Esquire, Appearing on behalf of the Defendant

Craig L. Silver, Esquire, Appearing on behalf of the Defendant

Christine B. Lewis, Court Reporter
Court House
Hagerstown, Maryland 21740

* * * just the way the proceedings go. Is there any opening statement you wish to give?

MR DWYER:

Very briefly, your Honor. I will just state that the defendant Mr. Jerry Wayne Eanes is charged with being in violation of Article 27 and it is one of the three disturbing the peace statutes. In this instance Article 27, Section 121 which deals with disturbing a neighborhood. It is alleged that he was loud and obscenely.... excuse me, loud and unseemly on the date of May 18th, 1988 in the vicinity of The Hagerstown Reproductive Health Services, Inc., 160 West Washington Street. It was a Wednesday.

The State is willing to concede that it's not part of the State's case that any profanity was used, any swearing or using obscene language was used. No fighting words were used. The State does not allege that any ingress or egress from the building was obstructed. In a nutshell, the State's case is that he was loud and unseemly.

Of course unseemly has been defined in the case law as having its ordinary dictionary meaning and I have some definitions of that which I will present to you in closing arguments.

The State also makes no contention that any sound amplification method was used. We allege that the defendant was loud and unseemly using only his naked voice. And finally, the State stands ready to prove that the arrest and prosecution of Mr. Eanes on the 18th of May of this year was a valid and

* * * *

lishment that faces right on West Washington Street that you can hear traffic noise inside that establishment with the windows closed and the air conditioning on, isn't that the case?

A. [Nissa Reuak, business tenant on West Washington Street] I guess I've become oblivious to traffic noises so I really don't pay attention to them.

Q. Is it your testimony that you never hear traffic noise?

A. I hear traffic sometimes but it doesn't bother me.

Q. And with the air conditioning on and the windows closed, correct?

A. Did I say that I had the air conditioning on that day?

Q. I'm asking you generally.

A. Ah I could hear traffic. Sometimes it doesn't bother me.

Q. And sometimes it does?

A. I suppose if there were a fire or ambulances or fifty tractor trailers going down it might disrupt me for a second yeah.

Q. Alright. A lot . . a lot of loud vehicles use that street don't they?

A. I really don't spend that much time looking out the window and paying attention to that noise, sir.

Q. Alright. So you don't know. You don't know . . it's not . . it's not a busy street, is that your testimony?

A. Well it's a busy street.

Q. Alright. The fact is that in the summer of '87 jack hammers were being used out there weren't they?

MR. DWYER:

Objection.

THE COURT:

Overruled.

A. The summer of' 87?

Q. That's correct.

A. Jack hammers? I believe that there were jack hammers.

Q. Alright.

A. In the summer of '87.

Q. You could hear them inside your establishment with the windows closed and the air conditioning on, couldn't you?

A. Yes sir.

Q. Excuse me?

A. Yes sir.

Q. You didn't bother to complain about those noises to the police did you?

A. No sir. I didn't find them terrifically distracting.

Q. Alright. Isn't it true, M's Reuak, that you were objecting just as much to the words that Mr. Eanes was using, the group was using out there as you were how loud they were?

A. No sir.

Q. Miss Reuak, you testified on a number of occasions with respect to this matter before haven't you?

A. Yes sir but on this particular occasion . . .

Q. Well Mis Reuak I'm just asking you whether you . . .

A. That day I didn't even know what they were saying.

Q. Have testified. Would you please confine your response to my question. I'm just asking you whether you testified concerning Mr. Eanes' activities before.

A. I have testified with regard to Mr. Eanes before, yes. I really don't recall which time you're talking about sir.

Q. Alright. Well I haven't asked you anything about which time yet. Now M's Reuak when you testified previously the occasion you're referring to you swore to tell the truth, didn't you?

A. Yes sir.

Q. And did you tell the truth?

A. I would hope so sir.

Q. Well did you?

A. Yes I did.

Q. Alright. M's Reuak, on July 8th, 1987 didn't you testify in District Court as to the following: Question by Mr. Eanes - Is that what you object to, the loudness, right? Answer - The loudness. I object to hearing about babies being slaughtered. I object to hearing about murderers. I object to being subjected to all of this. Didn't you testify to all of that?

A. I did.

Q. Alright. And M's Reuak, on July first you gave testimony in the Circuit Court before Judge Moylan on this matter did you not?

A. Ah yes.

Q. And you also testified in District Court concerning Mr. Eanes' activities on July first of 1987, did you not?

A. I guess I did. If it's there. I really don't recall dates sir.

Q. Alright. Let me ask you if you recall this testimony. Question - Do you have any problem with the content? Answer - I have no

problem with . . actually I don't mind the Gospel being read outside, okay. I don't mind that. I have problems with hearing butchers, murders, killers. It makes me feel just wonderful sitting down there listening to that. I have a problem with that. That content I do. Didn't you testify to that?

A. Yes I did.

Q. Alright. I have no further questions. Thank you.

END OF CROSS EXAMINATION

THE COURT:

Anything else?

MR. DWYER:

Briefly on re-direct, your Honor.

* * * *

A. [Dana Dirling, resident of 160 West Washington Street] Yes sir.

Q. And there are a lot of big trucks on there.

A. Yes sir.

Q. There's a lot of traffic noise, is that correct? When you said the traffic was heavier, I want to just talk to you about that for a minute. Really . . strike that, will you. You testified that the one lane was blocked off, is that correct?

A. Uh huh. Yes.

Q. And so the only traffic that was actually moving past your apartment building was . . was ah in that one lane, is that right?

A. Uh huh.

Q. Normally there are two lanes?

A. Yes, sir.

Q. And both of those lanes are filled with traffic, isn't that correct?

A. Yes sir.

Q. And based on that, isn't it . . would it be fair . . more fair to say that normally with . . when there are two lanes open there are more traffic in the sense it's moving along and then there's really

less traffic on that day because it was confined to one lane, isn't that right? There may have been more vehicles up there.

A. There may have been less traffic but even if that's . . when there's two lanes of traffic then you're saying that that's more and there's more traffic noises. I never had any problem with the noise when there's two lanes of traffic. But this was only one lane of traffic and it was . . and therefore the traffic noises would be lighter and I could still hear them. I never had any problem before with getting him to sleep. That was what . . .

Q. So the traffic noise also bothered . . .

A. No I never had any other problem before.

Q. Well I . . on May 18th did it bother . . was the traffic noise bad? I mean you're saying that it bothered your boy.

A. I don't think the traffic noise was even focused upon because you could hear them over the traffic noise.

Q. Well I'm asking you whether the traffic noise itself bothered his sleep on May 18th?

A. No.

Q. Alright. Ah . . you I mean . . .

A. I really can't say whether it did or did not because he was asking, "Why are all those people down there screaming?" I mean the traffic was something that we lived with every day.

Q. Okay. And so you kind of got used to that traffic noise?

A. Right.

Q. There is that right? Okay. And because Mr. Eanes only

* * * *

MR. FRENCH:

That has a lot of relevancy, may it please the Court.

THE COURT:

Go ahead.

A. [Anthony Compello, business tenant of 160 West Washington Street]

Like I say, it depends. If it blocked . . if traffic is backed up you know and they're stopped they're not going to make as much noise but if the two lanes were there and they would keep moving

you know then it's possible it would make more noise. But with one lane traffic would have had to have been backed up. So it would have been a little more quieter.

Q. Okay. And ah . . isn't it true . . let me just ask you a question about your radio. You mentioned that you had the radio on inside your establishment that day?

A. Yes.

Q. The fact is on other occasions you didn't have that radio inside the building, did you?

A. I did not take a radio outside if that's what you're asking.

Q. I'm not asking if you did. Do you recall was there anyone from inside your business establishment at any time placed a radio out there when Mr. Eanes or other members of his group were out there?

MR. DWYER:

Objection.

THE COURT:

Overruled.

A. There was not a radio out there that day. In previous times I believe on one occasion in the past that I can recall there was a radio put out front for roughly about five, ten minutes. The police told them . . told the owner of Stage Struck, my boss Nathan Kahn to move the radio back inside which he did.

Q. Your testimony is that it was only one time that the radio was out?

A. I'm saying that I can recall one time.

Q. Okay. The fact is that when that radio is out there the noise drowns out the voices from Mr. Eanes' group isn't that true?

MR. DWYER:

Objection.

A. No.

Q. No?

A. That radio did not . . could not drown out anyone's voice when they're yelling.

Q. Well Mr. Campello, I want to just ask you, you've testified before haven't you . . sir in this matter? Concerning the activities outside Stage Struck?

A. I've testified several times yes.

Q. Alright. And on one of those occasions ah . . you testified did you not sir, Question - Does that radio that Mr. Kahn sits outside the shop periodically drown out our voices or the music that he put up there? Answer - I depends on whose voice it is.

A. I cannot recall saying that. I may have or I may not have. The thing is you know it does not totally drown...

Q. Well I'm just asking . . I'm not asking if . . .

A. It does not totally drown out someone's voice.

Q. Mr. Campello, I'm just asking whether you testified that?

A. I guess I did. You've got it in front of you.

Q. Alright. And ah . . isn't it true as well that . . well let me ask you another question . . strike that. Didn't someone come out of Stage Struck one time in a devil's costume and mocking Mr. Eanes and his group?

MR. DWYER:

I object.

THE COURT:

Sustained.

Q. May it please the Court, first of all I'd like to know the ground for the objection. I don't . . counsel has never stated the grounds and I'd like to have the opportunity to respond to the objection because it's very relevant.

THE COURT:

Why is it relevant?

MR. FRENCH:

It shows the motivation for the complaints, may it please the Court.

THE COURT:

Alright. Proceed.

A. There was a person that came out of there one time with a pitch fork. It was not a complete devil's costume. He worked next door at 162 with Theatre Effects.

* * * *

Q. Now the fact is that inside the center even with the windows shut and the air conditioning on that you can hear traffic noise and loud trucks on Highway 40, Washington Street, isn't that right?

A. [Diane Silas, Administrator of Hagerstown Reproductive Health Services Clinic]
That's correct.

Q. And that it's as well inside your establishment that with the windows shut and the air conditioning on you've heard jack hammers in use?

A. That's correct.

Q. Alright. And you've testified that you don't like loud noise when your establishment is in operation, correct?

A. Yes.

Q. And you didn't complain about the jack hammers to the police, did you?

A. No I don't believe I did.

Q. Alright. And your dislike of loud noises didn't prevent you from putting a radio outside of your establishment and turning it up really loud . . loudly, did it?

MR. DWYER:
Objection.

THE COURT:
Overruled.

A. Ah there was a day I'm not sure when, I don't believe it was that particular day but I do recall a day at some point where there were protestors who were screaming at the top of their lungs at which point it seemed to me that the only . . the only way to respond was to ah take the radio out.

Q. Well did you put a radio out there or not Miss Silas?

A. I'm saying that I did. Yes. And I'm saying why I did it.

Q. And wasn't it more than just one occasion?

A. Ah yes it was.

Q. Alright. The fact is that you turned that thing up full volume, didn't you?

A. That's correct.

Q. Alright. And you could hear that radio inside your own building couldn't you?

A. I was outside with the building . . outside the building with the radio. I could hardly be able to hear it on the inside.

Q. Did you stay out there the whole time with the radio?

A. Yes.

Q. You knew Mr. Eanes had been charged with the same offense before May 18th, correct?

A. Yes.

Q. In fact you were present at the trial on May 17th, correct?

A. Yes.

Q. You knew he had been acquitted, isn't that correct?

A. Yes it is.

Q. And with that knowledge you attempted still to have him arrested again for the same activity?

* * * *

MR. DWYER:

Okay. Let the record show he's identified the defendant Mr. Eanes.

Q. What exactly do you recall about what Mr. Eanes did or said that morning?

A. [Officer Wayne Shank]
Basically he was reading from The Bible as he walked up and down the street right in front of 160 West Washington Street ah doing the street preaching . . what is referred to as street preaching.

Q. How would you describe his tone of voice?

A. Very loud.

Q. Was there vehicular traffic, trucks and cars that morning?

A. Yes there was.

Q. How would you compare the sound of Mr. Eanes' voice to the sound of the trucks and cars?

A. Ah at times it was louder than the trucks and cars. Like I say, he would go in spurts. He would be very loud for several minutes and then he would you know quiet down for a couple of minutes and then get loud again.

Q. How long did you observe him do this?

A. Ah . . probably myself approximately five minutes.

Q. Is there anything else you recall about that morning regarding Mr. Eanes' conduct?

A. No sir.

MR. DWYER:

Okay. Thank you, Officer Shank. I have no more questions. The defense counsel may.

END OF DIRECT EXAMINATION

CROSS EXAMINATION

MR FRENCH:

Q. Officer, you arrived . . by responding to a dispatch call?

A. Yes sir.

Q. Could you just tell me what . . what that was? I mean I'm not familiar with a dispatch call.

A. The dispatch call?

Q. Yes.

A. The call came from Headquarters over our radio units is what is was.

Q. And did they say anything or tell you why to go to the area or what?

A. They were supposed to go in reference to a disturbance in front . . people in front making a lot of noise.

Q. Okay. Ah . . Isn't it true that Mr. Eanes here when you heard him preach that he only preached for a couple of minutes at a time, correct?

A. Loudly, yes sir.

Q. Alright. But it was only for a couple of minutes at a time?

A. Yeah. At a time and then he would stop for several minutes and then start again.

Q. And how many times did you hear him, do you recall?

A. I can't even recall how many. While I was there it wasn't that many times.

Q. Okay. Would you disagree with anyone's testimony . . strike that. Would you disagree if someone testified that Mr. Eanes spoke only on three occasions or four?

A. While I was there that would be the most that I heard him at . . at least . . you know at the most while I was there.

Q. Alright. And you also mentioned that a patrol car was parked in the traffic lane on Washington Street, is that right?

A. Yes mine was.

Q. I'm sorry?

A. Mine was.

Q. Yours. And that basically blocked the traffic in that lane, is that right?

A. It basically did. They had to change to the center lane to get by, yes sir.

MR. FRENCH:

I have no further questions, your Honor.

END OF CROSS EXAMINATION

MR. DWYER:

I have no further questions, your Honor.

THE COURT:

Alright, Officer, thank you. Now you're excused.

A. Thank you.

* * * *

Q. Was . . were you there once or twice that morning?

A. [Officer Harold Feigley]
I was there twice.

Q. Okay. Now these conversations with Mr. Schuller and Mr. Eanes you're referring to, were they conducted the first time you were there or the second time?

A. The first time.

Q. So there came a time when you left?

A. Yes sir.

Q. Why did you leave?

A. There was a . . a confusion among my supervisors in reference to a decision handed down by Judge Moylan the previous day and we were advised by Captain Hart to leave the area until we got a ruling from the State's Attorney's office.

Q. What happened after that?

A. We left.

Q. Okay. Did there come a time when you went back?

A. Approximately forty . . thirty to forty minutes after we left the first time I returned ah because the Department was still getting numerous complaints in reference to the noise of the people protesting in front of the abortion clinic, yes.

Q. Okay. So . . when you went back you observed Mr. Eanes doing anything?

A. Mr. Eanes was still protesting in front of 160 West Washington Street and he was still shouting at a very high voice ah the Gospel. Apparently he looked over towards us and he made a comment to myself, Officers Kenneth Stoner . . the Chief of Police Paul Wood, Captain Hart and Sergeant Spielman were on the corner by the Presbyterian Church on West Washington at Prospect and he shouted, "They ask for money for the war on drugs and murder . . ." and he didn't finish the conversation. And this he done in a very . . very loud voice.

Q. Okay.

A. At which time I went over and placed him under arrest for disorderly conduct.

Q. Why didn't you arrest Mr. Schuller"

A. Mr. Schuller was quiet the second time I came back.

MR. DWYER:

Thank you, Officer. I have no more questions. Your witness.

END OF DIRECT EXAMINATION

CROSS EXAMINATION

MR. FRENCH:

Q. Ah you mentioned Officer, is it Feigley or Feigley?

A. Feigley.

Q. Feigley. Ah you mentioned that you received a call from ah . . that you responded to to go to the abortion center, is that right, that vicinity?

A. Yes sir.

Q. And who did you receive the call from?

A. I got that from our police dispatch.

Q. Okay. Ah . . that wasn't the first time that you had

* * * *

THE COURT:

Or innocence of this matter it is not an issue.

MR. FRENCH:

Well your Honor, I'd like to at least then make an offer proof to that on this point.

MR. DWYER:

Objection.

THE COURT:

Sustained.

MR. FRENCH:

I'm not entitled to make a record . . on ah on whether it's admissible for this proceeding or not? Is that what your Honor is saying?

THE COURT:

That's correct.

Q. You mentioned that another man . . ah was out there speaking, is that correct Officer Feigley? Other than Mr. Eanes?

A. [Officer Harold Feigley]
Yes sir.

Q. And how much . . how much ah . . er strike that. He was louder than Mr. Eanes, isn't that true? Mr. Schuller I'm speaking of.

A. I would say just a small bit yes.

Q. Alright. Ah . . you never heard Mr. Eanes use any obscene language, correct?

A. None.

Q. Did you hear him use any vulgar or profane language?

A. None.

Q. Did you ever hear him threaten anyone?

A. No sir.

Q. Did you ever hear him urge anyone to break the law?

A. No sir.

Q. Did you ever hear him urge anyone to undertake any violent act?

A. No sir.

Q. Did you hear him u ge anyone to go on to the abortion center property?

A. No sir.

Q. Ah the only noise you heard him make was speech, is that correct?

Q. Yes.

Q. Ah he never went on the abortion center property, correct?

A. No sir.

Q. And he always . . strike that. You saw him on the side of the abortion ah . . the side of the street where the abortion center was, correct?

A. On the sidewalk, yes.

Q. Right. And you never saw him go on the other side, correct?

A. No.

Q. He never blocked the entrance to the abortion center, did he?

A. No sir.

Q. And he stayed on the sidewalk there at all times?

* * * *

A. [Jerry Wayne Eanes]
Yes sir I did.

Q. How much time?

A. I spent ah two and a half tours, seventeen months.

Q. Okay. When was that?

A. Off and on between those dates.

Q. Alright. Are you familiar with the Reproductive Health Services, Mr. Eanes?

A. Yes sir.

Q. How do you know about that?

A. Well I know about it because of the . . all the church organizations and all the people I know and where I go to church with, we all know where the abortions take place.

Q. Alright. And have you been at the Reproductive Health Services before July 8th . . ah . . .

A. Yes, sir.

Q. Excuse me, before May 18th of '88?

A. Yes sir.

Q. Ah how many times have you been there prior to May 8?

A. Ah four or five times, six maybe at the most.

Q. Alright. And you were there on May 18th of 1988, is that right?

A. Yes sir.

Q. And what was your purpose in going there?

A. That purpose that we go to the abortion clinic is to . . to assemble to speak out against abortion, to pass out gospel tracts, to try to talk to girls that are walking by but the main reason that I go out there is to preach the Gospel of Jesus Christ.

Q. Alright. And were the police there on May 18th of 1988 when you arrived, sir?

A. Yes sir.

Q. And what was the general nature of their activities? If you could describe them for the Court please.

A. Well when arrived it was approximately 10:30, 11:00. We were later than, we normally try to get there around ten. And as soon as we walked around the corner we noticed that ah . . that there were police everywhere ah on both sides of the street, north and south side of Washington Street. And there were two or three police cars in the road and they were just everywhere. I was absolutely amazed. I didn't know what was going on.

Q. Alright. And was someone else speaking at the time you arrived?

A. Ah . . I noticed across the street that Mr. Timothy Schuller was speaking to some police officers but he wasn't (inaudible).

Q. Alright. Did you speak to him before you came to the ah area about being out there and preaching?

A. Ah . . no sir.

Q. Alright. You mentioned you were out there four or five times ah prior to May 18th of '88, is that right?

A. Yes sir.

Q. And ah during the times out there did you have an opportunity to observe the general noise conditions in the area surrounding the abortion center?

MR. DWYER:

Your Honor, I would object to any other date other than May 18th regarding this response.

MR. FRENCH:

Well your Honor, I believe it's appropriate because first of all I mean in determining what's loud ah clearly what's normal accepted activity during the course of the day in a particular location is relevant even if it is not on the day in question.

THE COURT:

Objection is overruled.

Q. So did you have an opportunity to observe the general noise conditions?

A. Yes. Well Washington Street is . . is always . . always very noisy. It's . . it's vibrant. There's always a lot of people and a lot of construction going on and a lot of ah trucks coming down and

stopping. There's two stop lights there and they're taking off and they're stopping and it's just a very busy area.

Q. Well could you describe the noise that ah comes solely from the traffic conditions ah in that area? Generally speaking.

A. Well generally ah as automobiles are coming that's . . that's where they're slowing down to either stop at that stop light before Prospect or they're taking off and sometimes they're taking off rather loudly or they're . . we have tractor trailers who are also coming down the street and they're down shifting and it's creating that back lash of their mufflers popping and carrying on and it's extremely noisy all the time,

Q. Alright. Ah . . how would you compare the noise from ordinary traffic to the volume from your voice when you're out there preaching?

A. Well you have to realize that the traffic from here to the . . to that table there, from where you're standing and they have cars taking off or . . or down shifting and so forth, the general noise level is much higher than what it is right now. And so you have to regulate your voice accordingly so you can communicate to people.

Q. Alright. Is there . . generally speaking when you've been out there have there been times when your voice has been drown out by traffic noise?

A. Well as I preached a lot of times even I would say even as I'm . . as I was talking ah you have to stop talking to allow a tractor trailer to go by. I'm just not . . I am not as loud as a tractor trailer or a jack hammer. I beg to differ. I'm just . . and they ah . . they would go by and I would stop speaking to allow that to happen so that I could

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THE COURT:

Well I'll let him testify as to what he's observed as to noises that occur during the time that he's there.

Q. Alright. You mentioned the noise from construction?

A. [Jerry Wayne Eanes]
There's . . .

Q. That you've heard out there?

A. During the 18th, May 18th there wasn't a whole lot more . . construction as there was other days.

Q. Well what about the other days?

A. The other days, unbelievable. There was a construction crew coming right through the street at the same time we were there. Ah . . they parked right beside us with a hugh compressor . . air compressor which generated the air to drive a jack hammer. The compressor ran full time. The jack hammer ran intermittently. As a result we . . we try and speak around those times where it wasn't so loud that you couldn't speak. We would try to speak at those times.

Q. How do you compare the noise from that ah construction to the volume of your voice?

A. I just can't believe anybody would say that I am as loud as a jack hammer even as loud as I can get because that would just . . it would if you stand near a jack hammer long enough you're going to lose your hearing.

Q. Okay. Ah . . did you . . were there any radios out there on any occasion that you were there preaching?

A. I've seen the radios on the . . placed out on the sidewalk, turned up loud. I've seen them set inside the buildings with the radio turned facing outwards blasting out . . just different times.

Q. Could you describe the noise from those?

A. They were usually turned up as loud as they could get to the point where they were squawking. The speakers would be . . making a squawking . . .

Q. Were the police there when these radios were being used, Mr. Eanes?

A. Yes sir.

MR. DWYER:
Objection.

THE COURT:
Overruled.

Q. Did they do anything about it?

A. The police were always present and they always just seemed to ignore any . . any and everything that happened other than what we were doing.

Q. Alright. Did other people speak ah . . let's talk specifically about May 18th. Were there other people out there besides yourself and you mentioned Mr Schuller who spoke with raised voices?

A. Were there any other people present?

Q. Yes.

A. We always had ah . . ah five or six people who were always there on Wednesdays. We tried to meet on Wednesdays between the hours of ten to twelve. Ah we would walk back and forth and we would try and pass out Gospel tracts.

Q. What I'm referring to specifically, Mr. Eanes, is people other than the group that you were in. Were there other people out there on May 18th that were speaking with raised voices that you heard?

A. Ah yes sir, there was ah . . it just seemed like May 18th everybody seemed to come out of the buildings. With all the police there that look across the street and two of the sidewalks were there and they were all laughing and yelling any heckling at us and ah then I seen another lady upstairs yell out and then people . . you always had a various difference of opinion. Some people would ride by and they would express their . . their support for what you were doing and there were people who would ride by and ah yell at you. You couldn't really hear them because of the traffic noises drown out what they were saying but you could hear them yelling.

Q. Okay. And were the police present on May 18th when these other people you referred to across the street were making . . yelling and heckling?

A. Yes sir.

MR. DWYER:
Objection.

Q. As you called it?

A. Yes.

THE COURT:

Overruled.

Q. And did the police do anything about that that you saw?

A. No sir.

Q. And could you hear those people's voices above the traffic, the sound from the voices in any event?

A. Ah you could hear people. When a person yells from a car you can hear it. And if the car was coming on and it was in proximity . . close proximity you could understand.

Q. Well I'm talking about the people across the street.

A. You could only hear them yell but I really couldn't tell what they were saying.

Q. Mr. Eanes, you were arrested on another occasion ah for a similar offense, is that correct?

A. Yes sir.

Q. And you were tried, is that right?

A. Yes sir I was.

Q. And ah . . can you tell me what the outcome was in Judge Moylan's court?

A. I was arrested July first and went to trial in Circuit Court and that was the day before, that was ah May 17th. We just got the decision from Judge Moylan and it was based on the exact identical charge. I have to mention that. When I'm on the streets . . .

MR. DWYER:

I would object to something non-responsive, your Honor.

THE COURT:

Sustained.

Q. Ah . . and you were acquitted you mentioned?

A. Yes I was acquitted.

Q. Did that have any . . well let me ask you, up until the time of Judge Moylan's decision had you refrained from going out to the ah . . ah area there to speak?

MR. DWYER:

Objection.

Q. For some time?

THE COURT:

Overruled.

A. I was afraid that I would be arrested for doing the same thing.

Q. Alright. And did Judge Moylan's opinion have any effect on your decision about going out there on May 18th?

A. I've never gone on the street for the purpose of being arrested. The only reason I was there to preach the Gospel and to speak out against abortion in front of the abortion clinic and I had done nothing . . exactly nothing different than I had done on July first. As a matter of fact I felt that I was even more orderly, more cooperative, ah just I tried to be a model citizen on the street. Because I know they have half a dozen police officers looking at me all the time, just looking for a reason to arrest me. So I'm trying to be the model citizen and trying to stay within my rights.

Q. Well let me ask you, when Mr. . . or when Judge Moylan issued his ruling how did that effect your decision, if at all, to go out there on May 18th?

A. I thought that the activity that we did on July first by going to court and finding out that I was not guilty, I felt that the activity that I did this preaching on the sidewalk, was protected and that I was exercising my freedom of speech and my freedom of religion on a public forum and that's exactly what I was doing. The reason I stayed away, because I wanted to find out if it was . . if I had done anything wrong and it was found . . I was found not guilty. So I went out there the day after which happened to be Wednesday again.

Q. And when you were arrested for that ah . . speech that you were acquitted for by Judge Moylan, had you been warned by the police officer at that time to quiet down?

A. Ah . . .

MR. DWYER:

Objection. I'm not sure when he's referring to, your Honor.

Q. I'm talking about the time ah . . when he was arrested and then acquitted, that time he was not warned by the police. What I'm trying to show is that it's consistent with his . . .

THE COURT:

Alright, whatever that time is. But you don't have the date of the arrest.

Q. Well what was the date . . do you remember the date that you were arrested?

A. July first.

Q. Alright.

A. I was never warned prior to May 18th, the day after my acquittal.

Q. Alright. And were you warned on July ah . . .

A. Yes sir I was.

Q. You were warned in July?

A. Not in July. May 18th I was warned.

Q. Okay. Did you do anything differently on May 18th than you did on July first?

A. The only difference that I can say that I did was ah . . when I was preaching on the 18th and I looked over and I seen . . I seen the Mayor, the Chief of Police and all these police officers just standing there and one of them had just gone up there and warned me. I informed him I just went to trial for that the day before, yesterday, and I just broke a rule I usually try to preach the Gospel or . . and I spoke out on what I felt that they were doing out there and I basically spoke to the police and instead of speaking to the general people in that area. I quoted that I felt that they should have something better to do with their time.

Q. And that was the content of your speech?

A. At the last just before I was arrested.

Q. That was the only difference?

A. That was the only difference I had ever done.

Q. Now Mr. Eanes when you were out there on May 18th, how many times did you speak before you were arrested?

A. About three times.

Q. And how long did you speak on the first two occasions?

A. I usually read a scripture which at the most don't take two or three minutes . . at the most . . each time.

Q. Each time? And then the third time how ah . . long was it when you began to speak before you were arrested?

A. Just . . just started speaking and ah . . they came by and arrested me.

Q. And did you speak against the practice of abortion on May 18th?

A. Yes sir.

Q. And did you raise your voice?

A. Yes sir I did.

Q. And why did you do that? Would you tell the Court why?

A. Because I'm speaking not just to the people in that building I was speaking to the general people that were in that area, the bystanders, the people driving by, the people that I knew were going to be coming in. There are a lot of people that . . who hear us speaking who may be considering going into the abortion clinic or were riding by and they might hear my voice and I feel like the Holy Spirit can convict them and turn their hearts and they may not stop and go in then there are people walking who are coming to the abortion clinic. I was hoping that it would affect them . . I was speaking to them.

Q. Were you trying, Mr. Eanes, in any way to bother or annoy people by raising your voice?

A. No sir, never.

Q. Were you trying to interfere with business activity by raising your voice?

A. No sir, I'm a business man myself and I was not trying to interfere with their business. I'm only there for a little and I don't speak that long.

Q. Alright. Did you make any other noises other than the words that you spoke out there on May 18th?

A. No sir. I try to speak the Gospel as clearly as I can.

Q. Alright. And did you use any profanity or vulgarity?

A. I never cuss.

Q. Urge anyone to go onto the abortion . . .

A. No sir.

Q. Center property?

A. Never.

Q. Ah did you yourself go on the property?

Q. Never.

Q. Did you ever go across the street, by the way, the way you heard one of the witnesses testify?

A. I never left the proximity of in front of the abortion clinic. That's where . . that's where the atrocity is taking place and that's where I stay.

Q. You stayed on the sidewalk at all . . .

A. Right in front.

Q. Times?

A. Yes sir.

Q. Did you urge anyone to take any unlawful action?

A. No sir.

Q. Or active . . urge them to undertake any act of violence?

A. No.

Q. Any alterations start out there?

A. No there was . . the only altercations was people maybe coming up to you and start yelling at you.

Q. Well there were no fights that started?

A. No. sir.

Q. Correct. Did you stop or interfere with the traffic in any way, Mr. Eanes?

A. No sir. The only interference with the traffic was the police themselves.

MR. FRENCH:
I have no further questions at this time.

* * * *

A. [Ted Simon, witness]
Yes.

Q. What day of the week is that?

A. On Wednesdays.

Q. What hours do you spend down there?

A. I normally go down ah shoot for nine o'clock, sometimes there a little after nine and leave about noon, a little before noon.

Q. And that's every Wednesday?

A. Pretty much.

Q. Mr. Simon, what is your normal activity when you go down in front of the abortion clinic on Wednesday mornings?

A. I walk ah up and down the street with a little ah sign and sometimes I'll hand out ah literature for the Crisis Pregnancy Center. Sometimes I'll talk to people. But most of the time I just walk back and forth.

Q. Mr. Simon, ah when you're down in front . . well, do other people join you ah in front of the abortion center?

A. Other people come there, sure. But it's not ah by invitation from me.

Q. Alright. Can you tell me a little bit about the general noise of . . general background noise while you're there on West Washington . . .

A. On West Washington Street?

Q. Yes.

A. A pretty noisy street. Ah we've had anything from ah those machines that have a blade and dig in the sidewalk . . ah dig in the street, make a straight line, jack hammers. One time we even had a machine that ah actually showed chewed up the macadam and then spit it up into the back of a ah . . of a pick . . of a dump truck and the dump trucks would back up and they'd fill up and they'd move out and this machine would continually chew up the ah . . the street. So it's a pretty noisy street.
Ah . . also there's a lot of traffic on it. There's a lot of traffic on the street.

Q. Okay. On the traffic noise what sort of traffic comes by there?

A. Well it's regular city traffic. A lot of cars, ah there's some trucks too, semis ah that I think come off the interstate and come through town and then there's local traffic.

Q. How often do the semis, the tractor trailer trucks come by?

A. Ah I would estimate maybe . . when the lights change maybe every other time the light changes you'll hear a semi.

Q. Alright. Mr. Simon, the other people that sometimes meet you or come out to the center if meet you is not accurate, do . . have you ever heard any of those people speak?

A. Yes some of the other people speak.

Q. Can you give me a comparison between the traffic that you hear and their voices in general?

MR. DWYER:

Objection.

THE COURT:

Overruled.

A. Ah . . when the trucks come in front where I am it normally drowns out noises of the speakers.

Q. Alright. What about the heavier equipment, construction equipment?

A. Yeah that's noisier than people's voices.

Q. Alright. And the jack hammers?

A. Much noisier.

Q. Mr. Simon, were you at the abortion center on May 18th of 1988?

A. Yes I was.

Q. What time did you arrive there that day?

A. A little after nine o'clock.

Q. Was anyone else there when you arrived?

A. I believe Mr. Ritchie was there.

Q. Alright. Did anyone else go with you to the clinic?

A. Yes my wife accompanied me that day.

Q. What did you do when you first arrived at the clinic about nine o'clock that morning?

A. I guess I put on my sign and started walking up and down which is ah east and west in front of the clinic.

Q. Did you see anyone else come . . well strike that. Did anyone else join you that day?

A. Well again other people came that day yes.

* * * *

[Bench Ruling of December 15, 1988]

THE COURT:

Well I have reviewed with you the State's evidence at the time of the Motion for Judgment of Acquittal. And I think it again needs to be reviewed because they . . and the evidence submitted by the defense form the basis for the facts that must be found.

Ah . . on one side the evidence indicates that Mr. Eanes was extremely loud. On the other side, the evidence indicates that he may have been loud but not as loud as Mr. Schuller. Mr. Schuller was the person who drew the public's attention. And how that evidence then meets or doesn't meet the elements of the offense.

The statute again talks about willful disturbance of any neighborhood by means of loud and unseemly noises. Now the loudness of Mr. Eanes' expressions ah may well be a matter of how one views it, how one hears obviously. What is loud to one person may not be loud to another. I don't mean to necess . . I don't mean to equate the . . that with the ah matter of obscenity but some people say and have said you know you know it when you see it. But also we know that what's obscenity to one person may be art to another.

But the Legislature said loud. So that has to be a fact that's found. And I would find from the evidence that Mr. Eanes' method and manner of expression was on this day in May of May 18, 1987 loud.

Now the Legislature also said and unseemly noises. And we know that the Court, the trier of fact is to give that adjective its common meaning, improper. And improper of course means under the circumstances. What is proper in one situation or under one set of circumstances may be improper in another set of circumstances.

Because it also means in violation of accepted standards of what is right or proper. So the noises have to be loud and in violation of accepted standards of what is right or proper. Loud and improper noises, that can mean speech. Because there has to be a balancing of one's right to express himself and other's right to be free from disruption.

Now the method here is what is being tested not the words. We do know that and there's no reason to keep on it. But it is not the content of Mr. Eanes' speech. There can be no chilling of that right to express what one believes. So it's not the content that is being judged or can be judged by any governmental agency. The manner, however, can be subject to restriction. And the statute here is a method of governmental ah . . restriction of the manner in which somebody expresses his views. Because it cannot be loud and unseemly. That is the manner, loud and unseemly.

I think it is a question of the disruption that is occasioned by the manner in which one expresses his views. There is the right to peaceful assembly. There is the right to peaceful expression either by way of actions through picketing or verbalization. It is the peaceful demonstration that is protected. When that method and manner becomes disruptive and does tend to incite or disturb then I think that an individual can be convicted of this statute . . violation of this stature.

And I disagree I guess again I go back and say that these are matters of . . of obviously great disagreement by judges at all levels of the trial bench and appellate courts of the State and Supreme Court. Because as we read in the long lines of Supreme Court cases we . . we read as much about descents . . the descents as we do in the majority opinions. That they go back a fairly long way in our history.

I say I disagree with defense counsel in that he feels that the law is that one can intend to communicate ideas and so long as that is the sole intent the person is free to use the manner in which he chooses.

All of this had to be . . be taken into . . into context of where and when. In the neighborhood where Mr. Eanes is protesting and preaching there are businesses, very very close proximity we know. We've heard testimony of the two businesses at least today, the two businesses who were affected by the manner in which Mr. Eanes was expressing his opinions. There are residences and we have heard testimony from two persons who were disturbed. Albeit one who was probably first disturbed by Mr. Schuller. There is testimony in evidence which is credible that the extremely loud manner by Mr. Schuller and by Mr. Eanes was in an alternating fashion. That one would be on one side of the street and loudly ah express his views. The other would be on the other side of the street. Mr. Eanes being of

course that individual that was closest to the people . . three of the people that were disturbed.

There is evidence that Mr. Eanes obviously through ah his experience at trial on the 17th, the day before was aware that his manner was disruptive to the neighborhood. He knew that it was. He felt however that he could I feel, felt that he could be disruptive in a sense of not caring about the peace and tranquility of the neighborhood so long as he was expressing his . . his ideas which would be protect . . the content of those ideas.

I would find Mr. Eanes guilty of willfully disturbing the peace and tranquility of that particular neighborhood during the morning of May 18th, 1987 by making loud and otherwise unacceptable improper under the circumstances noises. And I find him guilty.

Now as a consequence . . I don't know what was done in the District Court. I really don't . . that's not an issue. And I'm prepared to levy a fine. Is there any discussion that either counsel want to give to me in disposition?

MR. DWYER:

Your Honor, I would point out to the Court that Mr. Eanes was fined Five Hundred Dollars in the District Court. However, one of the reasons the fine was assessed at the maximum was because in the District Court he had had a prior conviction which was ultimately overturned by Judge Moylan. So I would submit that Mr. Eanes should be treated as a first offender.

THE COURT:

Mr. French, any . . anything you want to tell me about this?

MR. FRENCH:

If I may have just a moment?

THE COURT:

Sure.

MR. FRENCH:

Ah your Honor, I think the only thing we can say is that clearly Mr. Eanes believes that he was given . . that he was entitled to be out there and I think that should have some weight. Thank you.

THE COURT:

Alright. Mr. Eanes will be treated as a first offender and there will be a fine of Two Hundred and Fifty Dollars and costs. And if

there's a Petition for Cert ah payment of the fine and cost must be accomplished as a bond. So it would necessarily have to be paid within thirty days.

* * * *

I HEREBY CERTIFY, that the aforegoing is an accurate transcription of the procedings in the case of the State of Maryland versus Jerry Wayne Eanes, No. 4166 Criminaal Appeals in the Circuit Court for Washington County, Maryland held on December 15, 1988.

Christine B. Lewis

Court Reporter

CRIMINAL APPEALS NOS. 4078, 4081, 4082, 4083 and 4084

IN THE

CIRCUIT COURT
FOR
WASHINGTON COUNTY, MARYLAND

STATE OF MARYLAND

vs.

JOHN W. POOLE, RICHARD C. HICKS,
LEAH M. EANES, JERRY W. EANES, JOSEPH L. BANE

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 3
Hagerstown, Maryland
May 17, 1988

The above-entitled matters came on for trial in open court at 10:40 A.M.

BEFORE:

THE HONORABLE DANIEL W. MOYLAN,
Associate Judge

APPEARANCES:

DANIEL P. DWYER, ESQ.
Assistant State's Attorney
On behalf of the State of Maryland

CRAIG L. SILVER, ESQ.
DAVID A. FRENCH, ESQ.
DEBORAH A. AUSBURN, ESQ.
On behalf of the Defendants

Geraldine M. Lum, Court Reporter
Circuit Court for Washington County
County Courthouse
Hagerstown, Maryland 21740

MR. FRENCH:

Your Honor, may I have just one last point?

MR. DWYER:

Your Honor, I would object on that, having two arguments on one motion for acquittal, two chances to rebut. Defense has a chance to rebut and that was exercised.

THE COURT:

Alright, I'll sustain your objection.

I'm going to look this over and take the afternoon recess and reconvene in about ten minutes and I'll rule on the motion.

MR. FRENCH:

Alright. Thank you, Your Honor.

(Whereupon, the afternoon recess was taken. At 3:10 P.M. court was reconvened and the following proceedings ensued):

COURT'S RULING

This is a Court of Law and not a public forum, so I will announce my decision and I will tell all the parties, lawyers and spectators, whether my decision pleases you or displeases you or whether you think it's right or wrong, that this is not a place to express either your happiness or displeasure with the decision that I reach.

As I have told many people before, I make the decision and call the case as I see it. If I am wrong, there are courts higher than mine where people can go and can get redress, and in many cases, I must confess, from decisions that I have made.

As far as the public is concerned, if you feel that I'm wrong, wait until you get outside the door and on the sidewalks or anywhere else you choose, and you can take the decision to task as long and as loud and as vehemently as you like, but not here in the courtroom.

The Court is going to grant the motion for judgment of acquittal and the reason I am, I already indicated earlier that I believe the statute under which the Defendants were charged is constitutional, and there is a sufficient standard by which you can measure the conduct and it is a valid standard.

The case here really involves criminal law and also civil liberties, and the Defendants in this case, the evidence clearly shows, were exercising their civil liberties on this day in July in question, a Wednesday I believe, in 1987, and they were indeed on the public sidewalk and exercising their civil liberties. The particular means that they were doing may be offensive to some. It certainly was disturbing to the business people who had their businesses nearby.

What they were doing, the Court finds from the evidence, was preaching. They were preaching loudly. They were preaching, in some instances they were reading from the Bible and in some instances screaming, and I must say in regard to one of the Defendants, it was even described as screeching, but in all instances, extremely loud, very loud, certainly above the hubbub and noise of the busy street that runs in front of the particular business establishment where they were protesting, and I find that they were protesting.

What they were doing essentially was speaking or communicating. The First Amendment to the United States Constitution allows people to do this. It is one of the four basic liberties that is described in the First Amendment and the due process clause of the Fourteenth Amendment, which applies to the states and municipalities, incorporates this basic fundamental right of free speech.

The speech, as I say, is controversial and to some people the speech is disagreeable and they don't like to hear it, but it is one of the things that citizens in this country have a right to do, and that is to speak their minds and hearts freely and they have a right to do it in public and in public forums.

Things that these Defendants did not do is they did not obstruct the sidewalks. They did not fight or resort to any acts of physical violence. They did not incite others to fight or resort to any acts of physical violence, and they did not create a clear or present danger of harm to other people or other people's property.

One witness after the other testified that what was happening was loud and it interfered with their concentration. It interfered with their ability to communicate and with their thought processes in their offices. It interrupted with the conducting of their business but there was no indication at all that there was any threat of danger to property or human life as a result of the conduct that the Defendants were

engaging in, which was preaching against an activity conducted in that business establishment.

The basis of the case put simply is that the abortion protestors were disruptively loud and because of that they were arrested and fined and placed in jail under a criminal statute. As I have indicated, this is not a case about abortion, it is a case about the legitimate bounds of the exercise of the First Amendment rights and the legitimate bounds of restraints placed upon those rights by the arrest and charge under this criminal statute.

This is not a case involving prior restraints, and it's important to note that the Supreme Court, in some of the cases that have been cited to me and some that have been reviewed by me with my law clerk, indicate that the Supreme Court has indicated that there can be restrictions placed upon the time, place and manner by which protests or speech is conducted. This case was really an exercise in jumping over that intermediate step and, as I have indicated and as is quoted here from one of the Supreme Court cases which I relied upon, *Hague* versus *C.I.O.*, 307 U.S. 496, and the particular page that I'm reading from is page 516: "The privilege to use the streets and parks for communication of views on national questions" - and I would add parenthetically, on national questions which are controversial - "may be regulated in the interest of all...[but] it must not, in the guise of regulation, be abridged or denied".

Here there was no effort to regulate the time, place or manner in which this activity was to take place.

Another case cited to me by the parties and also by my law clerk is *Edwards* v. *South Carolina*, 372 U.S. at page 229, which bears a resemblance to this case. In that case there was what was described as a religious harangue by one of the protest leaders. There was loud singing of patriotic and religious songs, together with stamping of feet and clapping of hands. The Court, and that is the Supreme Court, described these forms of expression as an exercise of First Amendment rights "in their most pristine and classic form".

The nature of a place, the pattern of its normal activities, dictate the kinds of regulation of time, place and manner that are reasonable. A silent vigil may not unduly interfere with a public library, while making a speech in the reading room most certainly would. And

certainly, while there is such a thing as "free speech", the State would have a legitimate right to provide that the reading room would not be a suitable place or a public place for people to express themselves or exercise free speech.

Those are just examples. Here, the particular place very clearly was a sidewalk along the north side of West Washington Street, which is a one-way street with four lanes traffic and a busy street.

The Supreme Court said in 1964 in *Cox* v. *Louisiana*, 379 U.S. at page 536, and the part that I'm alluding to is found at page 544-545, "that a state cannot infringe upon the right of free speech and free assembly by convicting demonstrators under a 'disturbing the peace' ordinance", where in this case there were student protestors who were protesting segregation and discrimination against blacks by peaceably assembling and marching to the courthouse where they sang, prayed and listened to a speech. Although the content of the speech is different than this, the issue of the case presented before the Court there is not far removed from the issue or type of activity here. There are no allegations of violence, of bystanders being accosted, or of ingress or egress being interfered with in this case. There is simply the exercise by citizens of their First Amendment right.

The peace and benefit of the local businesses is clearly a valid interest but, under these circumstances, it should not be placed above the rights of citizens in the exercise of their First Amendment rights.

The case that you cited, the Maryland case, it was *Diehl*, the Hancock case, the Court of Appeals, in what was a four-to-three decision, but I'm not sure the three dissenters came down on this point, it seemed to be on another point, but there they indicated that the only speech that can be constitutionally prohibited as being loud and unseemly noises was expressions which advocated imminent lawless action or was likely to incite a breach of the peace. When the word "noise" in the statute is properly construed consistent with the First Amendment and traditional views, it encompasses communications made in a loud manner only when there is a clear and present danger of violence or when the communication is not intended as such but merely as a guise to disturb other persons. This quote comes from the Supreme Court of California and I think is a correct statement of the law.

I don't think, by any stretch of imagination, when these Defendants and some of their friends, brethren, had been out there on the street, apparently on some sort of regular basis according to the testimony here on Wednesdays, basically doing the same thing that they were doing on this date, although apparently not as loudly, that anybody could suggest that they were doing this as a guise to disturb the peace. They were indeed disturbing to some people but what was disturbing, it was not simply what was disturbing was their message, it also was the volume and the noise level. The First Amendment does not place any limitations on decibel level, and the louder people can sing or the louder they can talk sometimes in a public forum where their voices carry above others, is a means by which they communicate. The State can't regulate that through a criminal statute in a public forum without violating the protestors' First Amendment rights. It's just that simple.

The other thing that I didn't say but I meant to when I was going over the things that they were not doing, there was no indication of any vulgar or obscene language that was being used.

I also want to comment on one other aspect of this case. We've heard from the three preachers and the protestors. We've heard from the business people and how they were disturbed by the activity. One other comment that I want to make is that the police played a prominent role in this case.

There were two police officers, both of whom testified, and I was struck that both acted with restraint and were sincere and acted in good faith in what they believed to be probable cause of violations of those statutes rather than acting overzealously or excessively. I think the community in this case was well served by the police officers who testified here.

I also want to make a further comment in response to Mr. Silver's rebuttal that the First Amendment, which is certainly not anything that the Supreme Court invented, but has simply interpreted, very well may be a safety valve and provide a forum for people who feel very strongly on controversial issues and national issues of the day.

I was struck from beginning to end from both sides in this case, the Defendants and the State, that whether you talk about the business people or the protestors or the police, that all conducted themselves in

a non-violent fashion. It is something we can all be grateful for when you look around at the way that public expression is made in a lot of other places and a lot of other instances in the country. So I simply wanted to not only commend the attorneys in this case for the able way in which they presented the case and the authorities that they presented to me, but also the police for the way that they conducted themselves on this Wednesday morning in July of last year.

Court is adjourned.

MR. FRENCH: Thank you, Your Honor.

END OF PROCEEDINGS

* * * *

THIS WILL CERTIFY that the aforegoing is a true and accurate transcription of testimony taken in the cases of the State of Maryland vs. John W. Poole, et al, Criminal Trials Nos. 4078, 4081, 4082, 4083 and 4084 in the Circuit Court for Washington County, Maryland, on May 17, 1988.

Geraldine M. Lum

Court Reporter

Comparative State Statutes
Susceptible To Unconstitutional Application

RE: EANES V. MARYLAND

State Statute		Prohibitive Language
Ala. Code	§13A-11-7(a)	Unreasonable noise
Alaska Stat.	§11.61.110(a)(1) & (b)	Unreasonable loud noise
Ariz.Rev.Stat.Ann.	§13-2904(A)(2)	Unreasonable noise
Ark.Stat.Ann.	§5-71-207(a)(2)	Unreasonable or excessive noise
Cal. Penal Code	§415(1)	Loud and unreasonable noise
Colo.Rev.Stat.	§18-9-106(1)(c)	Unreasonable noise
Conn.Gen.Stat.	§53a-182(a)(3)	Unreasonable noise
Del.Code Ann.	tit. 11 §1301(1)(b)	Unreasonable noise
D.C.Code Ann.	§22-1121-(3)	Shouts or makes noise
Fla.Stat.	§877.03	Acts that effect the peace quiet
Haw.Rev.Stat.	§711-1101(1)(b)&(2)	Unreasonable noise
	§342-43	Excessive noise
Idaho Code	§18-6409	Loud or unreasonable noise
Ind.Code Ann.	§35-45-1-3(2)	Unreasonable noise
Iowa Code Ann.	§723.4(2)	Loud and raucous noise
Kan.Stat.Ann.	§21-4101(c)	Noisy conduct
Ky.Rev.Stat.Ann.	§525.060(1)(b)	Unreasonable noise
La.Civ.Code Ann.	art. 14 §103(A)(2)	Any [offensive or annoying noise or declaration
Me.Rev.Stat.Ann.	tit. 17-A §501(1)(A)	Loud and unreasonable noises
Md.Crim.Code Ann.	§122	Loud and unseemly noises
Minn.Stat.Ann.	§609.72(1)(3)	Boisterous and noisy conduct
Miss.Code Ann.	§93-35-12	Loud and offensive talk
Mo.Ann.Stat.	§574.010(1)(1)(a)	Loud noise
Mont.Code Ann.	§45-8-101(1)(b)	Loud or unusual noise
Neb.Rev.Stat.	§28-1322	Disturb the peace and quiet
Nev.Rev.Stat.Ann.	§203.010	Loud and unusual noises
N.H.Rev.Stat.Ann.	§644:2(111)(a)	Loud and unreasonable noises
N.J.Stat.Ann.	§2C:33-2(b)	Unreasonably loud and offensive course or abusive language
N.Y.Penal Law	§240.20(2)	Unreasonable noise
N.D.Cent.Code	§12.1-31-01(2)	Unreasonable noise
Ohio Rev.Code Ann.	§2917.11(A)(2)	Unreasonable noise
Or.Rev.Stat.	§166.025(1)(b)	Unreasonable noise
Pa.Cons.Stat.Ann.	§5503(a)(2)	Unreasonable noise
R.I.Gen. Laws	§11-45-1(b)	Loud and unreasonable noise
S.D.Codified Laws	§22-13-1(2)	Unreasonable noise
Tex.Penal Code	§42.01(a)(5)	Unreasonable noise
Utah Code Ann.	§76-9-102(1)(b)(ii)	Unreasonable noises
Vt.Stat.Ann.	tit. 13 §1026(2)	Unreasonable noise
W.Va.Code	§61-6-1b(a)	Unreasonably loud noise
Wis.Stat.Ann.	§947.01	Unreasonably loud